Office - Supreme Court, U.S.
FILED
AUG 30 1957
JOHN T. FEY, Clerk

LIBRARY
SUPREME COURT U.S.

No. 296

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

No. 12,044 and No. 12,045.

RAYMOND N. HEISELMOYER,

Appellant,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

Appeal From the Judgments of the United States District Court for the Eastern District of Pennsylvania (Civil Action No: 14,446 and No. 17,503).

APPELLEE'S APPENDIX.

H. FRANCIS DELONE,
RAYMOND W. MIDGETT, JR.,
BARNES, DECHERT, PRICE, MYERS & RHOADS,
1600 Three Penn Center Plaza,
Philadelphia 2, Pennsylvania,
Attorneys for Appellee.

International, 236 Chestnut St., Phila. 6, Pa.

TABLE OF CONTENTS OF APPELLEE'S APPENDIX.

Page

Relevant Portion of Deposition on Behalf of Plaintiff of E. J. Lobb Taken June 19, 1953 ..... 1b

Relevant Portion of Deposition on Behalf of Plaintiff of Raymond P. Whalen Taken August 27, 1953 ..... 2b

Opinion Disposing of Plaintiff's Motion Under F. R. C. P. 34 ..... 3b

Relevant Portions of the Transcript of the Pre-Trial Conference 4b

Relevant Portions of Plaintiff's Trial Memorandum 12b

Excerpts From Trial Transcript 15b

Plaintiff's Evidence.

Dr. Henry T. Wygis—

Direct Examination 15b

Cross-Examination 21b

Re-Cross-Examination 34b

Defendant's Evidence.

Dr. Kermit H. Lyman—

Direct Examination 35b

Cross-Examination 41b

Robert A. Groff—

Direct Examination 42b

Re-Direct Examination 47b

Relevant Portion of Plaintiff's Exhibit 28, Records of the Presbyterian Hospital 49b

Relevant Portion of Temple University Hospital Clinical Record for Admission of July 26, 1955 ..... 49b

Defendant's Exhibit 6 (Plan) 50b

Subpoena Duces Tecum 51b

Relevant Portions of Argument on Plaintiff's Motion for New Trial 53b

APPELLEE'S APPENDIX.

RELEVANT PORTION OF DEPOSITION ON BEHALF OF PLAINTIFF OF E. J. LOBB TAKEN JUNE 19, 1953.

(41)* Deposition on behalf of Plaintiff taken pursuant to notice, before Nancy Shaw, a Notary Public, in the office of B. Nathaniel Richter, Esq., Room 510, 121 South Broad Street, Philadelphia, beginning at 10 o'clock A. M. on Friday, June 19, 1953, there being present:

B. Nathaniel Richter, Esq., for the Plaintiff;

Arthur E. Newbold, III, Esq., of Barnes, Dechert, Price, Myers & Rhoads, for the Defendant.

* * *

(52) EUGENE J. LOBB, having been duly sworn, was examined and testified as follows:

By Mr. Richter:

* * *

(61) Q. Have the men complained to you about the seat backs?

A. Never.

Q. Have they told you that they block their free use of the brake?

A. Well, being you said that——

(62) Q. Yes?

A. Mr. Whalen did one time.

Q. Who is Mr. Whalen?

A. Bill Whalen was saying something about hitting the brake handle, but I didn't design the engine.

Q. We are not blaming you, brother.

A. I understand; but he did take—he drawed my attention to that about the first of this year.

* * *

---

* Figures in parentheses refer to page numbers of typewritten transcript.

RELEVANT PORTION OF DEPOSITION ON BEHALF OF PLAINTIFF OF RAYMOND P. WHALEN TAKEN AUGUST 27, 1953.

By Mr. Richter:

* * *

Q. Let me show you a statement; maybe this will refresh your recollection a little bit. On October 2, 1952—read that.

A. Yes.

Q. "I believe I tried to adjust the back rest by either pulling or pushing and still found it difficult to move so I just let it go." Is that correct?

A. Yes.

Mr. Griffin: For the record he is reading from a photostatic copy of a statement of Mr. Whalen purportedly given to Mr. Rosa on February 16, 1953.

Mr. Richter: Right, Mr. Rosa being the Pennsylvania Railroad claim agent.

* * *

OPINION DISPOSING OF PLAINTIFF'S MOTION UNDER F. R. C. P. 34.

GANEY, *J.* December 30, 1934

This is a motion by counsel for the plaintiff under Rule 34 for the production of statements of witnesses whose depositions have been taken.

The basic problem involved here revolves around *Hickman v. Taylor*, 329 U.S. 495; *Alltmont et al. v. United States*, 177 F. 2d 971 and the many cases too numerous to mention following the principles therein adverted to.

Plaintiff, in support of his motion, relies largely upon *Reynolds v. United States*, 192 F. 2d 987 and *Morrone v. Southern Pac. Co.*, 7 F. R. D. 214. In the former case the statement was allowed largely because the Appellate Court agreed with the District Court's finding that the "Statements and the report of the board's investigation undoubtedly contain facts, information and clues which it might be extremely difficult, if not impossible, for the plaintiff's with their lack of technical resources to obtain merely by taking the depositions of the survivors".

In the latter case the court held that signed statements must be produced for inspection upon a showing of good cause, such as impossibility or difficulty of access to witnesses or their refusal to respond to requests for information and the need for such statements for impeachment purposes.

While the plaintiff is entitled to have first-hand information as to every relevant fact in order to properly conduct its examination of witnesses and reach the truth in the preparation of its case for trial, a careful reading of the depositions taken herein, especially that of William B. Dempsey, I am convinced, shows that the whole aura surrounding their taking, mocked the orderly process of a fair hearing and thus precluded any showing of good cause.

Accordingly, in view of the record as here presented, it is the court's opinion that good cause has not been shown, and the plaintiff's motion is denied.

RELEVANT PORTIONS OF THE TRANSCRIPT OF THE PRE-TRIAL CONFERENCE.

(1) Philadelphia, Pa., September 28, 1955

Before: Honorable Caleb Wright, *J.*

Appearances:

B. Nathaniel Richter, Esq., of Richter, Lord & Farage, for the Plaintiff.

H. Francis DeLone, Esq., for Philip Price, Esq., and Raymond W. Midgett, Jr., of Barnes, Dechert, Price, Myers & Rhoads, for the Defendant.

(2) The Court: I believe that the plaintiff is represented by Richter, Lord & Farage?

Mr. Richter: That is right, sir.

The Court: Mr. Richter is here representing his firm, B. Nathaniel Richter. The defendant is represented by whom?

Mr. DeLone: By Philip Price, of Barnes, Dechert, Price, Myers & Rhoads. I am Mr. Delone and this is Mr. Midgett.

The Court: Gentlemen, at the outset I want to tell you that until a few months ago I was an attorney for the Pennsylvania Railroad Company on a retainer down in one of the lower counties in Delaware where we did not have a whole lot of business. The fact of the matter is, this is the first Federal Employers Liability case that I have had anything to do with.

Mr. Richter: That makes you especially prepared for this case, your Honor.

The Court: I guess so. They tell me what attorneys want is somebody who does not know anything about that particular kind of case. I am your man.

Mr. DeLone: I won't subscribe to that statement. I think that is what Mr. Richter wants.

(3) The Court: Mr. Richter, will you tell me the plaintiff's version of this case?

Mr. Richter: Your Honor, as you know, corollary to the Federal Employers Liability Act there is another statute known as the Boiler Inspection Act, which pertains to the locomotive and its various appurtenances. It is frequently referred to, along with several other statutes, as one of the safety appliance laws, and as such a violation of it imposes absolute liability without regard to negligence. You don't have to prove negligence, and no comment on negligence is necessary. A proof that there was a violation of the statute and that such violation contributed in whole or in part imposes absolute liability with no defense of assumption of risk, no deduction for contributory negligence, it is not a defense of any kind, and it presents a rather formidable case from the point of view of the plaintiff.

The language of the statute is that it shall be unlawful to use any locomotive in interstate commerce which presents a hazard, unreasonable hazard, to life or limb, the locomotive or any of its appurtenances.

In our case we are concerned with the seat in one of these locomotives. My man was an engineer or (4) fireman—I forgot which at the moment.

The Court: Fireman.

Mr. Richter: And in attempting to take his seat, either take it out or put it in, it was defective, as we shall show, and as a result of it he fell back against the wall of the en-

gine and struck his back and I think may have fallen to the floor—I am not quite sure at the moment—and suffered a very grievous injury. There is no question about what the injury was because within a few days he was taken to a hospital, removed to another where he was actually operated on, his back was opened, they removed a very bad disc that had been ruptured, and they did a fusion on him. He has been back in again since. He was up at the hospital only recently again. And while he is back working, he is makeshifting so to speak.

Heiselmoyer, whom I have known a long time, in my judgment is probably around 50 years of age, maybe a few years either way, comparatively a young man, with an expectancy of twenty years, and while he is working, whether he will be able to continue is a doubtful problem.

The Court: He is working now?

Mr. Richter: He is back working now on a (5) locomotive. I think he has some run, they said the other day when he was in, that made it a little easier for him. He has got a bad injury. He has had a bad injury, and he is in a sort of a semi-improved position, let's put it that way.

* * * *

(4) The Court: Can I ask Mr. DeLone to give the defendant's factual side of the case.

Mr. DeLone: From the defendant's standpoint, first let me say that we don't concede or believe that this is a Safety Appliance Act case, even if there was proof that the seat involved was defective.

Secondly, we do not concede there was any defect in this seat. This man never even reported the alleged accident until three or four weeks after he claims it occurred. He had had back trouble since 1949. The date of this accident was 1952, in the Fall of '52, the (7) date of the alleged accident.

He says he was removing a back rest from a seat and he pulled on it and he pulled too hard and he went back,

which in our view is not by reason of any defective seat, if it happened at all. If was just that he pulled too hard, and what he should have expected to happen did happen.

The Court: Well, it would be purely a question for the jury then.

Mr. DeLone: I think that is true, sir. I have no doubt it is a question for the jury to resolve. There is no doubt that the man did have a disc operation performed by Dr. Wycis within a couple of months, I guess, after the date when he says this accident happened. He returned to work in about six months. I don't have the exact amount here—he sustained a wage loss during that period when he was off for the operation of approximately $3,000. He has worked regularly since that time, despite suggestions to the contrary. His wage records show that his wages have been full and adequate ever since.

I know nothing, and didn't until today of any suggestion of traumatic arachnoiditis, if that is the term—I am not familiar with it; I will have to look it up— (8) because there has been no suggestion of that in any of the medical reports which have been furnished to us to date. And those are copies of reports that were furnished by Mr. Richter's examining physicians. If Mr. Richter has had telephone conversations with a doctor recently, then I would of course expect him to furnish me with a memorandum of that report because we have an agreement between our two offices that we will be supplied copies of reports of medical examinations. Of course, if they are telephonic reports, we expect them to be reduced to writing so we have the benefit of whatever that recent information is.

In short, I guess that is the defendant's position, sir.

I might add—I don't know whether Mr. Richter remembers this—there is a claim that in 1954 there was a second accident that has been pleaded. There are actually two complaints and two cases consolidated for trial. I believe we are here on both of those cases. It was ordered

that they should be tried together, and they are listed together on the trial list. So I assume that is the situation. In the second accident it is alleged that an employee opened the door of an engine and struck the plaintiff in the back. And that is denied by all the (9) rest of the crew who were on the engine at the time with the plaintiff. The claim, as I understand it, is that that second blow on the back aggravated the pre-existing back condition, the pre-existing condition which had been previously operated upon.

Mr. Richter: Let's put it this way, your Honor: We want to try them together for this reason: We consider both of these cases very clear cases of liability, and notwithstanding Mr. DeLone's protests about there being nothing wrong with the seat, we will prove the experience of others to everybody's satisfaction with the seat, that it was bound, it could not be removed, others tried to remove it, it was caught, and under the rule of the Gesanowski case and others in the Supreme Court, it is a pretty clear indication that this was a bad seat.

The reason we want to try the two together is this: Where you try the one first, you see, then they would say in the defense, Well, you had another accident, didn't you, and the injury which you are trying now we think came from the second one. When we got to the second one, they will say, you had that one from the first one. When we try them together with the same defendant, they are speared by either prong.

(10) Mr. DeLone: We agreed the two cases should be tried together.

Mr. Richter: For the purpose of making sure both are brought together.

The Court: In other words, the first case is a case involving an alleged defective or faulty seat, and the second is——

Mr. Richter: An F.E.L.A. case based on negligence.

Mr. DeLone: The first case is also an F.E.L.A. case.

Mr. Richter: I don't call it an F.E.L.A. case.

Mr. DeLone: You allege a violation of the Safety Appliance Act as a way of proving defendant's responsibility.

Mr. Richter: I can't say that I quite agree with that. May I send your Honor a little trial brief?

The Court: You may indeed, both of you. I was going to ask you for that.

Mr. Richter: So you will see this is a Boiler Inspection case.

The Court: I am not familiar with this, and I would appreciate a trial brief.

Mr. Richter: I will be happy to send you one (1) so you may review this thing.

Mr. DeLone: Particularly with reference to the law as it applies to the allegations here.

The Court: Yes, and anything that you think is going to be raised in this case which might involve matters that I am not familiar with. I will not take offense at anything you say. I would like to go into this for my own benefit.

You say that you don't think this first case is a Federal Employer Liability Act case. What do you mean by that?

Mr. Richter: The statute that governs the rights as between employees of railroads in interstate commerce is, generally speaking, the F.E.L.A. Were it not for the F.E.L.A., the individual Safety Appliance cases do not within themselves create a right, apparently, to bring an action on them. You bring the action because the F.E.L.A. creates a right against employers in railroad cases. But the case goes to the jury on the Safety Appliance law violation alone as far as the first cause of action is concerned. And in your charge, it has been held by the Supreme Court

of the United States in only the last few years in the O'Donnell, Carter and other cases, to be error (12) for the trial judge to tell the jury that negligence has anything to do with it at all.

The Court: I was just reading over one of Judge Kirkpatrick's charges to the jury, and that was a thing that puzzled me. I could not figure why he did not mention any question of negligence in the charge.

Mr. Richter: That is because it imposes absolute liability, as the cases repeatedly hold.

The Court: That is where there is shown to be a clear violation of a Safety Appliance provision only.

Mr. Richter: Wherever it is shown. As a matter of fact, it does not have to be as clear as your Honor suggests. Let me tell you some of the language. I had the Myers case which was argued in the Supreme Court of the United States——

The Court: Clear to the point that a jury would find it.

Mr. DeLone: Both the violation and the proof that the violation was causally connected.

Mr. Richter: Was a factor. May I point out to your Honor in all of these cases that the language insofar as causal relationship is concerned is different than in the usual tort matter. You don't have to show (13) that it is the proximate cause. The cases say if it in whole or in part was a factor, a factor as distinguished from the factor in producing the injury—and in an important case in the Fifth or Sixth Circuit, the McCarthy case against Pennsylvania, it was held to be error to say "the" as distinguished from "a" cause.

The Court: Well, I think that if you gentlemen will give me a trial brief or memorandum——

Mr. DeLone: I don't think you will find much difference between Mr. Richter and myself as to the theory of the Safety Appliance Act cases. I think our difference here lies more in the facts of this case and whether the Safety

Appliance Act is applicable at all and whether he can make out a violation of it.

Mr. Richter: If I show facts from which a jury may find that there was something wrong with the seat, I have shown a Boiler Inspection Act case. There is no question about that. They have held that a bell, a cord—you know, the bell cord on the locomotive—was a violation of it; they have held a broken window was a violation of it; they have held anything at all, any appurtenance. In other words, the Act says—if you had the Federal Code, I might read that language to you—it (14) says locomotive or any of its parts or appurtenances.

The Court: I read that much.

Mr. Richter: No doubt about it, the seat is an appurtenance of the locomotive.

Mr. DeLone: Do I understand, so far as the first accident is concerned, that you are going to rest your case entirely on the contention that there is a Safety Appliance Act violation, so that I need not concern myself with claims of negligence under the F.E.L.A. Act as distinguishable?

Mr. Richter: Right.

The Court: Then that is agreed between counsel, that on the first case the plaintiff's case will be based entirely upon the violation of the Boiler Inspection Act and the seat being defective and that the defendant will not be compelled—well, he will not have to meet any question of negligence.

Mr. DeLone: That is right.

Mr. Richter: Let me put it this way, that the seat was in a dangerous condition so that it created an unreasonable risk of harm to life or limb, so that I am speaking in the language of the statute itself.

Mr. DeLone: Of the Safety Appliance and Boiler (15) Inspection Act.

Mr. Richter: Yes.

RELEVANT PORTIONS OF PLAINTIFF'S TRIAL MEMORANDUM.

This is a suit under the Boiler Inspection Act, 45 U. S. C. A. § 23. This Act imposes absolute liability for a violation of it which, in whole or in part, causes injury or death. When we speak of the violation of the statute, we are speaking of a violation by the carrier in that it permitted a locomotive to be run on its line in which the locomotive or any of its appurtenances were in such condition that they subjected the employees working on it to an unnecessary peril to life, health or limb. In this case, the seat is such an appurtenance.

We may compare *Hines v. Smith*, 275 Fed. 766 (C. C. A. 7th, 1921), where a bell ringer was defective. An automatic bell ringer which could be operated manually but did not work properly was held to be a violation of the Act: *Eglsaer v. Scandrett*, 151 F. 2d 562 (C. C. A. 7th, 1945). Another bell case is *Scott v. Chicago, Rock Island & Pacific R. Co.*, 197 F. 2d 259 (C. A. 8th, 1952).

Oval headed bolts which projected three-eighths of an inch above the surface of a footboard were held to be sufficient to sustain an action under this Statute: *Louisville & N. R. Co. v. Botts*, 173 F. 2d 164 (C. A. 8th, 1949). A worn, warped or bent pilot step was held to be a violation of the Act: *Bolan v. Lehigh Valley R. Co.*, 167 F. 2d 934 (C. C. A. 2d 1948). An installation of a reverse power gear mechanism, installed horizontally above the engine footwalk leaving only ten inches on a footwalk upon which to walk, which though complying with the I. C. C. regulations was nonetheless held to be a question for the jury as to whether though meeting minimum requirements it did not in fact render so narrow a walkway perilous to life and limb: *Delevie v. Reading Co.*, 176 F. 2d 496 (C. A. 3rd, 1949). The absence of a hook and eye screw from the window of a locomotive cab was held to be a violation of the Statute:

Arnold v. Alton Railroad Co., 124 S. W. 2d 1092 (Mo., 1938).

Liability under the Boiler Inspection Act does not depend on negligence. Evidence from which the jury can and does find that the defect exists and that it is unnecessarily unsafe is sufficient to impose absolute liability. *O'Donnell v. Elgin, J. & E. Ry. Co.*, 338 U. S. 384, 70 S. Ct. 200 (1949); *Lilly v. Grand Trunk Western R. Co.*, 317 U. S. 481, 63 S. Ct. 347 (1943). [in which the presence of ice on the tender which caused the plaintiff to slip was held to be a violation of the Boiler Inspection Act]; *Urie v. Thomson*, 337 U. S. 163, 69 S. Ct. 1018 (1949). Since liability is absolute and is not based on negligence, the railroad is not excused by any showing of care, however assiduous. *Bolan v. Lehigh Valley R. Co.*, 167 F. 2d 934 (C. C. A. 2d, 1948).

The Boiler Inspection Act and the Safety Appliance Act and in pari materia with the Federal Employers' Liability Act. *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U. S. 205, 54 S. Ct. 402 (1934); *Lilly v. Grand Trunk and Western Ry.*, 317 U. S. 381, 63 S. Ct. 347 (1943); *Scott v. B. & O.*, 151 F. 2d 61 (C. C. A. 3rd, 1945).

Since liability under the Boiler Inspection Act is absolute and is not bottomed on negligence, it is not necessary to show notice to the defendant, actual or constructive, as to the defective condition. In *McCarthy v. P. R. R. Co.*, 156 F. 2d 877, 880 (C. A. 7th, 1946), *cert. den.* 329 U. S. 812, 67 S. Ct. 635, the Court said:

> ". . . No notice to the defendant, constructive or otherwise, as to the defective, unsafe condition of the locomotive, was necessary to be shown."

Contributory negligence, if any, of the plaintiff is no defense, partial or otherwise, to liability for violation of the Boiler Inspection Act. Act of April 22, 1908, c. 149, Section 3 (45 U. S. C. A. 53).

Certainly a seat which cannot revolve its full three hundred and sixty degrees and in fact interferes in the

course of its being turned with the functioning of various brakes and brake handles on the locomotive is a serious defect. To allow that seat to become defective so that it is difficult to remove it, is certainly one which renders the locomotive perilous to life and limb.

This Act imposes absolute liability; it is a duty which is non-delegable, continuing, and one imposed upon the railroad at all times: *Baltimore & Ohio R. Co. v. Groeger*, 266 U. S. 521, 45 S. Ct. 169 (1925); *Delevie v. Reading Company, supra; Louisville & N. R. Co. v. Botts, supra;* and *Bolan v. Lehigh Valley R. Co., supra.*

* * *

Respectfully submitted,

RICHTER, LORD & FARAGE,

By B. NATHANIEL RICHTER,

Attorneys for Plaintiff.

EXCERPTS FROM TRIAL TRANSCRIPT.

PLAINTIFF'S EVIDENCE.

* * * *

SECOND DAY.

* * *

(128) DR. HENRY T. WYCIS, having been duly sworn, was examined and testified as follows:

* * *

(130) DIRECT EXAMINATION.

By Mr. Richter:

* * *

(132) Q. Now, Doctor, in the course of your practice did you, at my request, examine, admit and treat Mr. Heiselmoyer, the plaintiff, in this case?

A. Yes, I did.

Q. When was it that you first saw Mr. Heiselmoyer?

A. Well, Mr. Heiselmoyer was admitted to Temple University Hospital on October 22 of 1952 and I saw the patient on the following day.

Q. And did you receive a history from him at that time?

A. Yes, I did.

Q. And what did you learn?

A. Well, the patient at that time was 49 years of age, and he stated that on September the 19th while working on a locomotive he attempted to remove the back of a chair to get to the brake.

(133) Apparently the back of the chair had been jammed so that it was difficult to remove. However, with violent force the back of the chair gave way so that he fell backward against the wall of the cab, striking the low back

region. He felt no immediate pain at that time and continued working.

However, on the fourth day after this episode he began to complain of severe low back pain and six days later he noted pain going down the back of his thigh, his calf and into his heel. This pain was aggravated by sneezing and coughing and it was associated with a sleepy feeling in the ball of his foot.

He worked until the last month but had to discontinue this because of the pain which was so severe, and he was admitted to the Temple University Hospital on October the 22nd.

(148) Q. Now, Doctor, when you got in and got a chance to look at this particular disc, tell us what you found?

A. Well, when I removed this nerve to the side I found in this case a ragged mass of cartilage material and removed several fragments, and, as I say, it was associated with a great dealing of bleeding from these veins which are compressed and were actually congested by this massive obstruction, and eventually then the patient's hemorrhage was controlled and the disc was removed in several large ragged fragments.

Then after pressure was removed from the nerve root, we then proceeded to close the muscles over this defect with stainless steel wire.

Q. What I want to know is what did you find there so far as confirmation or disconfirmation of what your myelogram had shown?

A. Well, the myelogram indicated that site of the ruptured disc, and at that point where I went in, mainly from clinical evidence but also from myelogramic confirmation, there was a ruptured disc and we found a ruptured disc there.

Q. You did find a definite ruptured disc; any question about that?

A. And a bad one at that.

* * *

(160) Q. As I understand, in October of 1953, that was the first time that you found clinical evidence now to demonstrate that unfortunately some arachnoiditis had set in?

A. I believe so, because at that time it was a year later. He had done well, and according to my examinations he had shown improvement, but a year later definitely he had evidence of this condition of arachnoiditis or another condition of recurrent ruptured disc.

In other words, you can have a rupture occurring in the same position again.

* * *

(161) Q. Now, Doctor, I believe we had just completed the examination of October 13, 1953, in which you told us that you had found positive evidence of the presence of arachnoiditis.

Now, thereafter, Doctor, what was the course of the——

The Court: Just a minute, Mr. Richter.

I don't believe that is correct.

By The Court:

Q. Did you say that, Doctor, that you found positive evidence?

(162) A. I felt that on the date of that examination that the complaint—that was October 22, is that right, 1953?

Mr. Richter: Yes.

The Court: Right.

A. —that he had symptoms at that time which would indicate an arachnoiditis.

By Mr. Richter:

Q. Was that your belief?
A. That was my belief.
Q. Very good.

The Court: Excuse me. I just want to get this straight.

By The Court:

Q. Didn't you say that for recurring disc involvement?
A. Yes, it could be. That is correct.

* * * *

(166) Q. Let me put it as a typical hypothetical question. Doctor, I would like you to assume that Mr. Heiselmoyer was a man who worked without symptoms or complaint of any kind for many years as a locomotive engineer of any pain whatsoever in his back and that on September 19, 1952, while on a locomotive engine and attempting to pry loose the back rest of the seat it came free suddenly so that he was thrown against the bulkhead of the cab of an engine and thrown there with considerable force and twisted in an (167) attempt to maintain his stability without falling, and then thereafter had some pain in his back, came home at night and his wife rubbed it for him; thereafter received osteopathic treatment within three or four days, who gave him some manipulation, and finally about ten days after the occurrence in question was admitted to the Presbyterian Hospital where he was placed in traction and where the course of development is such as revealed to you in the hospital records of that hospital which you have read and where you obtained the history to know what they did, the various steps you made, performed the operation you did in this case and made the observations you did as to the nature and character of the injury in-

volved and then followed through with the course of development that as you know has taken place up to the date of the second accident.

Are you able to express an opinion, Doctor, as to the cause of the condition which you found in this man's back?

The Court: Just a minute.
Do you wish to object?

Mr. DeLone: No objection.

The Court: Answer it.

By Mr. Richter:

Q. What is your opinion?
(168) A. I feel that the injury that he sustained was the direct cause for the ruptured disc.
Q. You mean of the 19th of September——
A. Yes.
Q. —1952; right?
A. Yes.

* * *

(173) (The following occurred at side bar:

Mr. Richter: He is going to tell us what this picture is and I don't want this fellow to hear him.

The Court: You have no objection to testimony going on without his client being present in court?

Mr. DeLone: No, I don't.

Mr. Richter: I don't want him to hear what this picture is.

The Court: Do you have any objection, Mr.
(174) DeLone?

Mr. DeLone: No, it is entirely up to Mr. Richter.)

(End of side bar discussion.)

(The plaintiff left the courtroom.)

By Mr. Richter:

Q. All right, go on, Doctor, please. I'm sorry for the interruption.

A. I decided it would be best to readmit this patient because of the recent symptoms, pain in the right leg and pain down the right side. Of course, he still had pain down the left side as well. That is persistent all the time. That hasn't changed, nor has the neurological picture changed.

He was admitted to the Temple University Hospital on July 26, 1955, and at that time, we placed him, because of the acute symptoms, in a period of traction, and this traction did relieve his pain on the right side. So that we felt that from the traction improving him, we would do nothing further at the moment, and we discharged him on August the 3rd, 1955.

Q. All right.

And he was at the hospital how long at that time?

A. From the 26th to the 3rd, eight days.

(175) Q. Well, now, what was your diagnosis as of that time, Doctor?

A. Well, my opinion was that he had a ruptured intervertebral disc of the right side. In other words, I felt he had a contralateral recurrence of the disc.

Q. Doctor, this man has since that time returned to work, hasn't he?

A. I believe he has.

Q. And can you tell us—and, of course, he has not been operated on again, has he?

A. No.

Q. Does he have to be?

A. I believe he should be operated on. Eventually he will have to be operated on for the right side for the recurrence of the ruptured disc.

* * *

(179) Q. Doctor, do you have an opinion as to whether or not there will or will not have to be an operation, one way or the other?

A. I believe that it will come to an operation.

Mr. Richter: All right.

* * *

(189) CROSS-EXAMINATION.

(189) By Mr. DeLong:

* * *

(191) Q. Did I understand that Mr. Richter referred Mr. Heiselmoyer to you, sir?

A. Correct.

Q. When did you hear about Mr. Heiselmoyer? Did Mr. Richter call you himself about it?

A. Yes, he did. Yes.

Q. That was before he came to the Temple Hospital; is that right?

A. I think it was very close to that time. I know it was a matter of a day or so.

Q. And you have the hospital records here; you were referring to them, were you not?

A. Yes.

Q. And the hospital bills at the Temple Hospital were guaranteed by Mr. Richter; is that correct?

A. Yes.

Q. Is that also true of your bill, Doctor?

A. Yes.

Q. Now, do you make it a practice of reporting to Mr. Richter every time you saw Mr. Heiselmoyer?

A. I believe, as near as I can remember, that I did, according to the examinations.

(192) Q. You have copies of all those reports there, have you not, Doctor; that is what you were testifying from;——

A. Yes.

Q. —is that right?

A. That's right.

Q. And you knew, of course, that those reports were going to be furnished also to counsel for the railroad company, did you not?

A. I didn't know that, no. I don't know what the procedure is there. I don't think that's any of my business.

Q. Doesn't Mr. Richter always ask you to supply extra copies so he can furnish them to counsel on the other side?

A. He asks us to supply extra copies, but I don't know what he proposes to do with them.

Q. Is that the usual practice?

A. Yes.

Q. So that we may be clear on the dates, when you saw Mr. Heisemoyer, I understand you saw him first at Temple Hospital on the 22nd of October, 1952?

A. No, I believe he was admitted—he was admitted on the 22nd.

Q. I'm sorry.

You saw him the next day, did you, Doctor?

A. That is correct, yes.

(193) Q. Was that the 23rd, then, when you saw him?

A. Yes. There is a reference here in my report to Mr. Richter of October 27th, in which I stated that he was admitted on October 20th. That is a typographical error. That should be October 22nd.

But I actually saw the patient for the first time on the 23rd. He was admitted that evening and I saw him the following day.

Q. And you operated on him on the 24th; is that right?

A. Yes.

Q. And he was discharged from the hospital. Then the first time you saw him after discharge was November 19th; is that right?

A. November 19th, 1952.

Q. When was he discharged, Doctor? I'm not sure I got that date.

A. That was November 2. I saw him about seventeen days following discharge.

Q. And then when did you next see him after November 19th, 1952?

A. I have here the next time is August 17th of 1953 as the next date—the date of the next examination, according to my records.

Q. After August 17th, 1953, when was the next time you (194) saw him?

A. I saw him then on October the 22nd, 1953.

Q. And the next time?

A. December 15th, 1953.

Q. I think, Doctor, your report indicates you saw him on the 13th, but you sent a report to Mr. Richter on the 15th.

A. That is correct.

Q. And then when was the next time after that?

A. April 22 of 1954.

Q. And then?

A. July 1 of 1954.

Q. And the next one?

A. July 22, 1954.

Q. And when, after July 22, 1954, did you see Mr. Heiselmoyer?

A. May 10 or May 9 of 1955.

Q. 1955.

Then you saw him on July 22, is that right, and recommended that he be rehospitalized, July 22, 1955?

A. That's right.

Q. He was discharged, then, on August 3, 1955?

A. That's correct.

Q. And you saw him next on August 17th, 1955, and then October 6th, 1955; is that correct?

(195) A. Correct.

Q. Now, you made a report to Mr. Richter of each of those examinations of Mr. Heiselmoyer, did you not?

A. Yes.

Q. Those——

A. It is entirely possible I may have seen Mr. Heiselmoyer on these occasions that a report was not sent to Mr. Richter. That's possible; I don't recall it.

Q. Do you have any records to indicate any possible examinations other than disclosed by the——

A. No.

Q. —reports that you have here?

A. No.

Q. And they indicate you made a report each time you saw Mr. Heiselmoyer?

A. These reports, yes, indicate that.

Q. You have looked through those reports, have you not, sir?

A. Yes, I have.

Q. Is arachnoiditis mentioned as your diagnosis in this case in any one of the reports of all of those examinations?

A. No, the diagnosis of arachnoiditis is not mentioned, but if you refer to my report of October 22, although I didn't state it in specific——.

(196) Q. October 22 of what year, Doctor?

A. 1953.

Although I didn't specifically use the term "arachnoiditis," there were symptoms at that time which would indicate that diagnosis.

Q. Didn't you think that was sufficiently significant to warrant commenting on?

A. I felt the symptomology was significant. I didn't see where placing the name on this condition would alter the condition any.

Q. Don't you send these reports to Mr. Richter to give him the benefit of your opinion as to the plaintiff's condition, Doctor?

A. I did. I didn't say it was arachnoiditis——

Q. Does your report of October 22, 1953, contain any diagnosis or suggestion of this condition?

A. Well, you must remember——

Q. As being your opinion?

A. You must remember these are follow-up reports. These are follow-up examinations as to the follow-up condition of the patient as to surgery, and in these reports you don't specifically mention diagnoses.

You simply report the progress of the patient. (197) You don't keep repeating the diagnosis.

Q. Then there wasn't any difference or change in the report of October 22, 1953 that was worthy of special comment; is that it?

A. Well, except the fact that I didn't make any specific diagnosis at that time. I don't think one could definitely come out and say at that particular time that this was arachnoiditis, although the symptoms present at that time would indicate that diagnosis.

Q. Well, now, in your report of August 17th, 1953, you gave Mr. Richter the benefit of your impression, didn't you, when you said that the patient was operated on for an intervertebral disc but there is still residual symptomology of low back pain and the left sciatic pain following this operation.

A. That is correct, but that is not a diagnosis.

Q. Well, did you even give an impression in any of these reports of arachnoiditis?

A. No, I didn't specifically say so.

Q. In any of the reports?

A. No.

Q. From the beginning down through 1955?

A. I have already said so, I did not give that impression in any of these reports.

Q. You did undertake, didn't you, Doctor, within two (198) months after this report of October 22, 1953, to again state your impression.

Would you look at that report?

A. What report are you referring to?

Q. Your report of December 15, 1953.

A. Yes, I have an impression again, but not a diagnosis.

Q. And in your impression you said nothing about arachnoiditis.

A. No, I didn't.

Q. You said the patient has residual low back pain and sciatic pain and neurological residual following removal of ruptured vertebral disc.

A. Yes, but those residuals were the aftermath of surgery and indicated arachnoiditis.

Q. Is that always the case?

A. It isn't always the case, but it did in this case.

Q. You don't——

A. I called it—I didn't call it arachnoiditis. I called it neurological residual.

Q. And then in your report after April 23 you—after December 15, you simply referred back, on April 23, to your December 15th impressions without any further attempt to describe your findings; is that correct?

A. That's correct.

(199) Q. And on July 2, you said the picture remains unchanged——

A. Correct.

Q. —other than this impairment and pain impairment to sensation over the left calf.

Did you obtain a history from Mr. Heiselmoyer when he was admitted to the Temple Hospital or when you saw him at the Temple Hospital.

A. Yes, I did.

Q. Did you do that yourself or was that obtained by the hospital?

A. Well, there are—as a matter of fact, there are three histories here, my own history and the history of my resident and the history of the interne, but these reports are what I found from asking Mr. Heiselmoyer myself.

There are other facts in the history taken by the interne and resident. I think we must also remember that when I saw this patient, this patient was seen on the morning—sometime that morning, and Mr. Heiselmoyer was in quite a good deal of distress, so much so that we, that afternoon, gave him an anaesthetic to do the myelogram, so that I had to rely not only on my history but the resident and interne's histories.

Q. Both your own history and the other histories taken at the hospital were lacking as to any complaints of back (200) trouble or back pain prior to September 19, 1952; is that correct?

A. I believe we have no mention of any back pain prior to this incident of September, 1952.

Q. That was a factor in your expressing your opinion that the September 19, 1952, injury caused the intervertebral disc rupture; isn't that correct?

A. Yes, that is true.

Q. When you examined Mr. Heiselmoyer on July 22 of 1954, that was when he told you about an occurrence of July 9th of the same year, an occurrence when a door had hit him in the back?

A. That is correct.

Q. And so far as you could see, you could find no physical evidence of any blow to the back; is that correct?

A. No, that's not true. If you recall, I stated that on examination, on palpation to the right of the incision—I am referring to that examination, but I know this was after this injury that he complained of that I found tenderness on palpation to the right of the incision.

Q. When you say you found it, you mean you pressed and he said it hurt?

A. That's right.

Q. But you saw, then, no visible evidence of any injury?

(201) A. I stated so. If there was any visible evidence, that would appear immediately, and at the time I examined him, July 22, and the injury occurring on July 9th, several days had elapsed, so there may not have been any visible injury.

Q. You said you thought he was recovering from a contusion.

A. A contusion is an injury to the muscles and ligaments to the spinal column.

Q. It was my impression he had a contusion in the region. I didn't quite understand what you meant by "contusion."

A. I said he had a contusion involving muscles and ligaments of the spinal canal.

Q. Did you say that in your report, Doctor?

A. No, I didn't.

Q. Would you look at your report, your report to Mr. Richter of July 23?

A. I only stated "confusion," but at that time if he had a contusion, where would the contusion be? It had to be the lumbar area.

If it was a contusion, it had to involve the muscles, ligaments and bones. Primarily muscles and ligaments.

Q. Your report says it is your impression that he is recovering from that contusion; is that right?

A. That is true.

Q. "Contusion" is another word for bruise, isn't it, (202) Doctor?

A. Yes.

Q. But again you saw no physical evidence when you examined him twelve days after the accident——

A. That is correct.

Q. —the day you said the accident occurred, and he also told you there had been swelling but you could find no evidence of swelling?

A. That is correct.

Q. Doctor, did they take any X-rays at the Temple Hospital on this most recent admission?

A. Yes.

Q. And do you have there the conclusion of the radiologist as to what the X-ray showed in August of 1955 when Mr. —I guess it was late July—when Mr. Heiselmoyer was in the Temple Hospital for the second time?

A. Yes, it states—shall I read what the conclusions are?

Q. Yes, would you, please?

A. We have noted degenerative arthritic changes in lumbar spine which appear to have increased since our study of 1952 in the form of a laminectomy, which is the operation that has been performed. Nothing else of note is seen.

Q. The degenerative arthritic changes have increased is the normal course, is it not, of arthritis.

(203) As we get older, we get a little more arthritis?

A. That's right. As we live a little more, we get a little more change in the arthritic joints.

Q. Doctor, would you look at the history obtained at the Temple Hospital on July—the date of this last admission. I forget, July 26th or 27th.

A. 26th.

Q. I wonder, since you only have one copy, if I may look over your shoulder, sir.

I believe there is another history, Doctor. Would you let me look at this for a minute? I beg your pardon. It's under the admission note.

Who makes that, Doctor?

A. I think the resident makes that.

Q. The resident physician?

A. Yes.

Q. And what does that say, first, about Mr. Heiselmoyer's condition when he was discharged back in 1952?

A. Whereabouts are you referring to?

Q. "He was discharged——"

A. "He was discharged asymptomatic except for occasional backache."

Q. That is at the end of his earlier hospitalization?

A. That is correct.

(204) Q. And then what is the history with reference to the current hospitalization that starts with the beginning of the next paragraph?

A. About a year ago, July, 1954, his low back was accidentally hit by a door.

Q. Yes? Will you read on?

A. Since then he has had recurrent low back pain, cramps and dull ache and hamstringing of the calf muscles on the right. No radiating shooting pain, no weakness, no aggravation of pain on coughing.

Q. No——

A. Aggravation of pain on coughing. For the past months symptoms have grown worse, being unable, often times, to straighten up back after bending down.

Q. Now, did I understand you to testify, Doctor, that in your opinion Mr. Heiselmoyer has had a recurrence or might have a recurrence of a ruptured intervertebral disc?

A. I think his symptoms, particularly at the time of admission at the hospital, from my findings, were that he had a recurrence.

Q. You find he has had a recurrence?

A. I believe he has a recurrence, yes.

Q. Well, now, Doctor, would you look at your report of October 6, 1955, when you examined him last week?

(205) A. Yes.

Q. And would you look at the impression stated in that report?

A. Yes. The impression was that this patient should be extremely careful of his activities since he is in danger of causing recurrence of the ruptured intervertebral disc.

Q. Of the ruptured or a raptured?

A. It is a ruptured disc, but it still refers to the original ruptured disc, which I think he had at the time of the admission. That is the same disc on the right side.

Q. You said that he is in danger of causing recurrence; is that right?

A. Causing a recurrence, yes.

Q. Now you say that he has it.

A. Yes—well, I don't say at this time he has it. I don't say as of right now.

Q. Then he doesn't have a ruptured intervertebral disc at this time? Is that your opinion?

A. I think I would clarify——

Q. Would you just answer that question, Doctor? I want to know what your opinion is.

A. I cannot answer your question unless you can phrase the question in such a way as to know what a recurrence is.

(206) By Mr. Richter:

Q. Go on and explain it, Doctor.

Mr. DeLone: Mr. Richter, if you please, I will examine the witness——

Mr. Richter: May the witness explain his answer, Your Honor?

Mr. DeLone: There is no question at the moment.

Mr. Richter: Just a minute.

You are not going to shoot questions at him—may he explain it, Your Honor?

The Court: I think he can explain his answer.

Mr. DeLone: I don't believe there is a question. Will you read the last question and answer?

(The pending proceedings were repeated by the reporter.)

By Mr. Richter:

Q. Go on, Doctor.

A. At the time this patient was admitted the second time, it was my opinion he had a ruptured intervertebral disc. At that time he was placed in traction. Traction now has allowed that ruptured disc to return back to its normal position.

Therefore, he was symptom-free following the five days of traction. He still has a tear, he still has a (207) ruptured disc. If he does further activity now, that tear will increase and he will get more recurrence.

By Mr. DeLone:

Q. Very well.

You are not able I assume, to predict exactly what might precipitate this condition again?

A. Well, I would say that activity of bending, stooping, turning, climbing; those would do it.

Q. When you first admitted Mr. Heiselmoyer back in 1952, you felt you were able to diagnose his condition really on the basis of a phone report, didn't you?

A. Correct.

Q. And you prepared to go ahead with surgery on that basis; is that correct?

A. That is correct.

Q. But before you did go ahead you confirmed it by a myelogram; is that right?

A. That is correct.

Q. Have you had any myelogram performed recently during this last hospitalization?

A. No, there was a definite reason in my mind as to whether or not the myelogram should have been performed on the second admission, and there are points in favor of it and points against it, and I felt that the risks in-

volved in doing (208) another myelogram were not justified, and one always tries the simpler things first.

Had he not been relieved by traction, I might have decided to go ahead with a myelogram.

Mr. DeLone: That is all.

The Court: Are you finished, Mr. DeLone?

Mr. DeLone: Would Your Honor indulge me just a moment?

By Mr. DeLone:

Q. Doctor, those Temple Hospital records you brought here, would you please leave them, too, sir?

A. Yes. I believe there is a slip that must be signed for them. I must return them to the record room, but if that slip is signed as a receipt, you may keep them. But I must return the receipt to the hospital.

Q. Doctor, one thing I meant to ask you.

You examined Mr. Heiselmoyer on July 22, 1954, which was twelve days after this second occurrence or after he reported the second occurrence of the door hitting his back; is that right?

A. That's right.

Q. And then you didn't see him again until May 9th, 1955?

A. That is correct.

Q. Did he inform you at the time of his examination (209) of May 9, 1955, that his case was due to be tried the following week?

A. I don't recall, sir.

Q. That it was listed for trial?

A. I don't recall.

Q. Did Mr. Richter tell you that?

A. The only time I knew this was listed for trial was possibly a week ago.

Q. You knew it before you made your examination of October 6, 1955, didn't you?

You knew that the case was coming up.

A. Yes, I think it may have been on that date.

Q. Well, you talked with Mr. Richter on the telephone before that, hadn't you?

A. I talked with Mr. Richter on the telephone after that.

Q. Didn't you talk with him on October 1st or some time around there?

A. I may have, but I don't recall it.

Q. Well, I have a memorandum of a telephone conversation with Mr. Richter, which he gave me, Doctor. That's all I can go by, so I assume you did.

A. That would be true. I did.

* * *

(212) RE-CROSS EXAMINATION.

By Mr. DeLone:

Q. Is there any mention of the arachnoiditis in the Temple Hospital records you have?

A. Not that I recall.

* * *

(712) DEFENDANT'S EVIDENCE.

SIXTH DAY.

DR. KERMIT H. LYMAN, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. DeLone:

Q. Doctor, you are an osteopathic physician practicing in the City of Philadelphia, are you, sir?

A. And in the suburbs. Havertown.

Q. Where is your office?

A. 1100 Darby Road, in Brookline, Havertown.

Q. Of what institution are you a graduate, sir?

A. Pardon me?

Q. Of what institution are you a graduate?

A. Philadelphia College of Osteopathy, 48th and Spruce; Philadelphia.

Q. What year?

A. 1940.

Q. Have you been practicing osteopathy since that time, sir?

A. That's right.

Q. In the course of your practice as an osteopathic physician, have you had occasion to see and treat Raymond Heiselmoyer, the plaintiff in this case?

A. Yes, I have.

Q. When did you first see Mr. Heiselmoyer?

(713) A. July the 3rd, 1951.

Q. And for what did—what were his complaints at that time, Doctor?

A. Pain in the right arm and shoulder, the neck, upper dorsal area or between the shoulders; and a history of broken ribs in 1949.

Q. He gave you a history at that time; is that right?

A. That's right.

Q. That was July 3rd, 1951?

A. That's right.

Q. You are referring to some records that you are reading?

A. Yes,——

Q. What is that?

A. —my case history.

Q. And who maintains that?

A. I do.

Q. Is it in your own hand, sir?

A. That's right.

Q. And when did you next see Mr. Heiselmoyer?

A. Well,——

Q. And tell us whether it was for the same or a different condition.

A. You mean the dates I saw him in July of that year; (714) or what?

Q. Yes. Just continue on.

A. I saw him July the 3rd,—this is 1951: July 3rd, 10th, 11th, 13th, 16th, 24th, 17th,——

Q. Wait a minute. You're up to the 24th, Doctor?

A. 24th; that's right.

Q. Now you said "17th." I'm sorry——

A. Now wait a minute.

27th, rather. I'm sorry. 27th, 29th, the 30th.

Q. That's in July, 1951?

A. That's right.

Q. Now, were the complaints at that time the same as those on July the 3rd?

Mr. Richter: Objected to.

By Mr. DeLone:

Q. Well, I—tell us whether or not the complaints were the same; or what they were.

A. Well, up until July 29th we treated him for his pain in the right shoulder, and then on the 29th we treated him for a pain in his low back, in the sacroiliac and lumbar area.

Q. What was that, Doctor? Where?

A. Sacroiliac and lumbar area.

(715) Q. That was on what date?

A. July 29th and 30th.

Q. Of what year?

A. 1951.

Q. And when, after July 29th, 1951, did you see him?

A. Well, I saw him July 29th and 30th.

Q. I'm sorry. And July 30th.

A. And then we skip to——

Q. Would you tell us whether or not the complaints were the same on July 30th as on July 29th, 1951?

A. Yes.

Q. When, after July 30th, if at all, did you see him, Doctor?

A. We skip to September 12th of 1951, and then he had pain in his sacroiliac area and pain in the low back area with sciatic pain on the left.

Q. Now, what do you mean by "sciatic pain," Doctor?

A. Well, sciatic pain is the sciatic nerve which supplies the lower extremity which rises from the lumbar area, which is the low part of the back, and fibers from the sacral area near the sacroiliac articulation, and they go down and supply the whole lower extremity.

Q. When you say "the lower extremity," what do you mean, Doctor?

(716) A. Well, leg, thigh and so forth. Buttocks and so forth.

Q. On which side was the sciatic pain?

A. At that time it was on the left side.

Q. Excuse me, Doctor. Would you go ahead, then? That was September 12th, 1951.

A. And I saw him September 12th and September the 18th, and, as I say, we treated his low back. We also—and his back at that time was much better on those two visits.

Q. Now, that was September 18th, 1951?

A. That's right.

Q. But would you tell us whether or not the complaints on the 18th were the same as on the 12th?

A. That's right.

Q. And when did you next see him after that, Doctor?

A. We skip, then, to 1952; March the 21st and 24th.

Q. Yes?

A. And the trouble at that time was pain again in his low back and in his neck.

Q. Is that the same on both the 21st and 24th, 1952?

A. That's right.

Q. And then when did you next see him?

A. Then it skips to September 25th of 1952. He had a very severe pain in his low back at that time, and then we saw him September 25th and 29th, and on the 29th the (717) back was very very bad and we advised X-rays, and that was the last time I saw him until 1955.

Q. Now, when you saw him on September 25th, 1952, did he give you any history of an accident?

A. He said that he had had an accident on a train.

Q. When did he say that, sir?

A. When he first came in.

Q. On—now are you referring to the very first visit that he made?

A. No, on September 25th of 1952.

Q. Now, it was at that time he gave you a history, Doctor.

Would you look at your record, sir?

A. Well, I don't have an actual history, but I mean at that time—I didn't make a notation of what transpired at that time, no, but since, I mean, he may have——

Mr. Richter: I object to this. He's made an answer. He's covered it. Now we're getting into "may have's."

Mr. DeLone: I think the witness should be allowed to finish his answer.

Mr. Richter: He started to say "may have."

The Court: I will overrule the objection.

Let him finish the answer.

(718) A. Well, as I say, he may have told me about the accident, but I didn't make a notation of it, which, as a rule, we don't in accident cases. We don't put them down because if we did we would be filling our history up with things——

By The Court:

Q. You don't know whether he told you on September 25th about an accident?

A. As far as my history goes——

Q. No, as far as you can recall.

Do you have any present recollection of whether he did or didn't?

A. He certainly must have, because otherwise I wouldn't have—anyone who comes into your office is going to tell you how they hurt themselves.

By Mr. DeLone:

Q. Well, Doctor, do I understand that you mean by that that if he had had an accident, he would have told you?

Mr. Richter: That is objected to, and he has already said the contrary.

The Court: I will sustain the objection on that.

By Mr. DeLone:

Q. Let me ask you again, Doctor, whether or not on—

(719) July 3rd, 1951, when you first saw Mr. Heiselmoyer, you made any note on your records at that time of a history that he gave you?

A. Yes, I did, which was the broken ribs, as I say. The 6th, 7th and 8th ribs were broken at that time. But how it happened, I mean I didn't make a notation in my history, no.

Q. I see.

And so far as what your records disclose with reference to September 25th and September 29th, 1952, would you tell me whether or not I am correct in stating your records do not disclose that he gave you any history of an accident at that time?

A. That's right, they do not.

Q. Now, when did you next see him?

A. July 25th of 1955. At this time there is a record of what happened because there, 1955, I have in my history of July, 1955, "Struck with door on 7-9-54 in the right hip."

Q. Now, the date of the visit, do I understand correctly, was July 25th, 1955?

A. That's right.

Q. But the history you received at that time referred to an accident when?

(720) A. 7-9-54.

Q. And when you tell me that, Doctor, you are doing that on the basis of referring to your records which show that; is that correct?

A. I am referring to my records now, that's right.

Mr. DeLone: Would Your Honor indulge me for a moment?

By Mr. DeLone:

Q. Doctor, you have already told us that Mr. Heiselmoyer visited you on March 21st and March 24th——

A. That's right.

Q. —1952.

And you said, as I understand it,——

Mr. Richter: I object to his stating what he said. If you got any questions, ask him directly.

He can't go into this sort of thing.

By Mr. DeLone:

Q. All right.

Would you tell us after looking at your records what each and every complaint was that he made, if he made any?

Mr. Richter: That's objected to.

By Mr. DeLone:

Q. On those dates.

(721) Mr. Richter: It's already been covered and it's already in. There's no need to re-hash this thing, sir.

The Court: I don't know, Mr. Richter, whether it has or not.

Mr. Richter: He told us exactly what his pain was and what he treated him for.

The Court: He complained again of low back and neck.

Mr. Richter: That covers it.

The Court: We don't know whetner it does or not.

By Mr. DeLone:

Q. Would you look at your records, Doctor, and tell us what they show?

A. March 21st he complained of pain in the low back sacroiliac area and the neck. It was the same on the 24th.

And we treated him for his pain in the low back and on the neck, and on the 24th it was much better.

Q. I'm sorry. Did you say the 23rd, too, Doctor?

A. 24th. 21st and 24th.

Mr. DeLone: Cross-examine.

CROSS-EXAMINATION.

(722) By Mr. Richter:

Q. Doctor, on every occasion but on the occasion in 1952 you were able to give him some treatment and get him perfectly all right, weren't you?

A. Right.

Mr. Richter: That's all.

By Mr. Richter:

Q. By the way, you have July 9th, the date he was hit in his back?

A. That's right, 7-9-54.

Mr. Richter: 1954.

That's all. Thank you very much.

Mr. DeLone: That's all.

(Witness excused.)

* * *

(752) ROBERT A. GROFF, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. DeLone:

Q. Dr. Groff, you are a practicing physician in the City of Philadelphia?

A. Yes, sir.

Q. Of what institution are you a graduate, sir?

A. University of Pennsylvania Medical School, 1928.

Q. And since your graduation, could you tell us whether or not you have specialized in any particular branch of medicine?

A. Yes, I specialize in neurosurgery.

Q. Neurosurgery?

A. Yes.

Q. And could you tell us what professional societies and organizations you belong to?

A. I belong to the American Medical Association, the American Neurological Association; the Society of (753) Neurological Surgeons, the Harvey Cushing Society and so forth.

Q. What was that last one?

A. The Harvey Cushing Society.

Q. What is that, Doctor?

A. That is a neurosurgical society named in honor of Harvey Cushing, who was primarily our first neurosurgeon in this country, or at least one of the greatest.

Q. Now, with what institutions are you connected at the present time, Doctor, and please name all of them and indicate your title?

A. At the present time I am professor of neurosurgery at the Graduate School of Medicine at the University of Pennsylvania.

Q. At the Graduate School?

A. Graduate School of Medicine at the University of Pennsylvania.

Q. Is that where doctors study?

A. Yes.

Q. Yes?

A. Chief of the neurosurgical department of the Graduate Hospital, chief of neurosurgery in Pennsylvania, Presbyterian and other hospitals.

Q. Well, would you just name the rest, if you can (754) remember all of them, Doctor?

A. Abington Memorial, Bryn Mawr, Cooper Hospital, Our Lady of Lourdes and so forth.

Q. Where is Cooper?

A. In Camden, New Jersey.

Q. Now, Doctor, at my request would you tell me whether or not you examined X-rays taken by Dr. Colcher in March and April—X-rays of Mr. Heiselmoyer taken by Dr. Colcher in March and April of 1949?

A. Yes, I did.

Q. And similarly at my request, tell me whether you examined X-rays taken by Mr. Heiselmoyer at the Presbyterian Hospital in October of 1952?

A. Yes, I did.

Q. And similarly at my request, did you examine the hospital records of the Presbyterian Hospital covering Mr. Heiselmoyer's hospitalization in October of 1952?

A. Yes, I did, and I examined him on the 6th of October, 1952.

Q. You examined him yourself on the 6th of October, 1952, Doctor?

A. Yes.

Q. And did you examine the records of the Temple Hospital covering Mr. Heiselmoyer's hospitalization there in (755) October of 1952 and again for a period of six or seven days in July or August of 1955?

A. Yes.

Q. And did you also examine X-rays and myelogram taken at the Temple Hospital in—I think it was October 23, 1952?

A. Yes, I did.

Q. Doctor, you said you have seen Mr. Heiselmoyer at the Presbyterian Hospital?

The Court: Mr. DeLone, excuse me. Were all those records in evidence?

Mr. DeLone: They are all here in court. They have all been identified, and so far as I know they are in evidence, and if not, I am glad to offer them in evidence.

Mr. Richter: Without any objection from me.

By Mr. DeLone:

Q. You said you saw Mr. Heiselmoyer at the Presbyterian Hospital on October 6th, 1952?

A. Yes, sir.

Q. Was that in consultation with anyone? Were you asked to see him by anyone?

A. Yes, I was asked to see him by Dr. Stevens under whose care he was.

(756) Q. And what was your diagnosis at that time? If you need the records, please let me know.

A. No.

Herniation of the nucleus pulposus at L-5 on the left side.

Q. Now, Doctor, taking into account each of the items that you said you examined, specifically Dr. Colcher's X-rays in 1949, Presbyterian Hospital's X-rays in 1952, records of the Presbyterian and Temple Hospitals, and the Temple Hospital X-rays, and taking into account the fact that on July 29th and July 30th, 1951, Mr. Heiselmoyer consulted an osteopathic physician with complaints of pain in the sacroiliac and lumbar areas of the back, the fact that on September 12th and September 18th, 1951, he again consulted an osteopathic physician with complaints of pain in the low back, sacroiliac and pain along the sciatic nerve down that leg; that he again consulted an osteopath on March 21 and March 24, 1952, with pain in the sacroiliac, the low back and the neck; that he claims to have had an accident on September 19, 1952, which he alleges occurred in the following manner: That he was in the cab of this engine which is shown on Plaintiff's Exhibit No. 3, and that he was leaning over to remove the back rest of the seat which is shown in the photograph in this manner, (757) in an area approximately 24 inches wide, that he pulled on the seat and it suddenly gave so that his back went against something behind him, either the window or the bar shown in that photograph; that he continued to work after September 19th, 1952, consulting an osteopathic physician on September 25 and 29, 1952, for low back pain, and that he continued to work until he was admitted to the Presbyterian Hospital on October 2 and also considering the fact that when operated on by Dr. Wycis on October 24th, 1952, Dr. Wycis found massive ragged spontaneously ruptured disc material at the fifth lumbar interspace, which was removed in several large ragged fragments from the left

side, are you able to express an opinion as to whether or not the accident alleged to have occurred on September 19, 1952, was the sole cause of the condition found by Dr. Wycis?

Mr. Richter: Objected to.

The Court: Objection overruled.

By Mr. DeLone:

Q. Can you express an opinion, Doctor?

A. Yes, I think I can.

Q. And what is your opinion, sir?

A. With the history that you gave me——

Mr. Richter: Now, pardon me, Doctor.

(758) Do you want to see us for just a minute, Your Honor?

The Court: Yes.

* * *

(762) (End of side bar discussion.)

By Mr. DeLone:

Q. Doctor, do you remember that long question?

A. I thought I heard it.

Q. Would you go ahead, now, sir?

Read to the Doctor just the beginning of his answer, if you would?

(The last answer of the witness was repeated by the reporter as follows:

"With the history that you gave me——")

A. With the history that you gave me, it seems to me with the sequence of events that occurred, that this man was beginning a herniation of the nucleus pulposus at the time he consulted the osteopathic physician and received treatment for backache with sciatic radiation which, as I remember, was down the left side, which agrees with the operative findings of a left disc.

By Mr. DeLone:

Q. Now, when you referred to the visit to the osteopathic physician with complaints of pain down the left side, I ask you whether or not you are referring to the visit that occurred—visits that occurred on September 12th and 18th, 1951?

A. 1951, and also the visits in 1952. As I (763) remember, you said March, 1952.

Q. There were two visits—excuse me, sir.

Are you also, then, referring to the visits of March 21 and March 24, 1952, when there were complaints of pain in the sacroiliac area of the low back?

A. That's right. The incident of the 19th of September may have aggravated the condition, but apparently it did not prevent him from working up until the time that symptoms developed and his admission to the Presbyterian Hospital which incapacitated him and caused him pain severe enough to be admitted to the hospital.

In view of the fact that Dr. Wycis found a ruptured disc, I would say that the rupture occurred probably just before his admission to the Presbyterian Hospital and thus caused him sufficient pain to seek definitive therapy.

Q. When you say "just before," Doctor, what do you mean in terms of time?

A. I think about one or two days in respect to the history that was given.

* * *

(772) RE-DIRECT EXAMINATION.

By Mr. DeLone:

Q. Doctor, at the time you made your diagnosis on September 19, 1952, was there any history in the history obtained at the Presbyterian Hospital—tell us whether or not there was any history of back complaints prior to September 19, 1952?

Mr. Richter: That is objected to as already covered.

Mr. DeLone: Mr. Richter asked him a question about his diagnosis in 1952 and he said he didn't make any finding——

The Court: Overrule the objection.

By Mr. DeLone:

Q. Do you want to see the hospital record, sir?

(773) A. Yes, I don't remember.

I don't see any reference to it.

Q. Any reference to what, just so we are clear?

A. I beg your pardon?

Q. You don't see any reference to what?

A. You said to symptoms prior to September——

Q. 19th.

A. —19th.

Q. 1952.

A. There are no statements to the effect that there were symptoms before September 19.

RELEVANT PORTION OF PLAINTIFF'S EXHIBIT 28, RECORDS OF THE PRESBYTERIAN HOSPITAL.

10/22/52 6:30 P. M. Discharge Note—
Pt's lawyer
arrived.—Pt. signed
his release
~~the rele~~ witnessed
by Dr. Boyd.—
Left the department
via cabulance
accompanied by
wife & lawyer.
[s] B. FRICK

RELEVANT PORTION OF TEMPLE UNIVERSITY HOSPITAL CLINICAL RECORD FOR ADMISSION OF JULY 26, 1955.

PROGRESS RECORD

* * *

8/3 Discharge to care of Dr. Wyeis. Able to get about — s discomfort. No further operative measures contemplated.

[s] SWS ..... JR.
(signature is illegible)

Note:

Page 50b is on Card 13.

SUBPOENA DUCES TECUM.

UNITED STATES DISTRICT COURT

FOR THE

.....

CIVIL ACTION FILE NO. 14446.

Heiselmoyer vs. Penna. R. R.

To Pennsylvania Railroad,

YOU ARE HEREBY COMMANDED to appear in the United State District Court for the Eastern District of Penna., at 9th & Chestnut Sts. in the city of Phila. Court Room #6, on the 12 day of October, 1955, at 2:30 o'clock P. M. D. S. T. to testify on behalf of Ptf. in the above entitled action.

(See reverse side.)

Date: 10/13, 1955

LEO A. LILLY,
Clerk.

By ROBERT E. CRISWELL,
Deputy Clerk.

Bring the Operating Department's statements and the Claim's Agents Department's Statements of the following persons, relating to this case.

E. J. Lobb
Thomas Martin
Chas. Grubecki (of New York)
Jos. F. Spreng
Harry W. Hall
Chas. C. Speas
Wm. B. Dempsey
Allen H. Blacklock
Wm. E. Whalen
A. J. Rosa
Harry Linnell
George Clark
Wm. Warner
Ass't Road Foreman, Gregorich
Charles Bonner

Also bring R. N. Heiselmoyer's Service, Health and Accident record. Also bring month by month earning and word record on R. N. Heiselmoyer from Jan. 1, 1949 to date.

RELEVANT PORTIONS OF ARGUMENT ON PLAINTIFF'S MOTION FOR NEW TRIAL.

(1) Wilmington, Delaware, March 2, 1956.

Before: Honorable Caleb M. Wright, *J.*

Appearances:

Richter, Lord & Farage, By: B. Nathaniel Richter, Esq., representing the plaintiff.

Barnes, Dechert, Price, Myers & Rhoads, By: H. Francis DeLone, Esq., and Raymond W. Midgett, Jr., Esq., representing the defendant.

* * *

Opening by Mr. Richter:

* * *

(33) The Court: Mr. Richter, may I get one thing straight here. When this supplemental motion was filed, when you filed it, was a copy of that affidavit filed upon your opponent?

Mr. Richter: You mean a copy of it—you mean of this affidavit?

The Court: Yes.

Mr. Richter: It wasn't sent to you or Mr. DeLone because my secretary didn't know about this deposition, and when she talked to me in Florida while I was away I said, Did you send the affidavit out? She said, No, what affidavit are you talking about? I said, Please get it out to both Mr. DeLone and your Honor, and it was sent to each of you the following day. That is the reason, because she (34) didn't know about it, and when I talked to her on the phone and said, What about the affidavit? she didn't know about it, and they were sent out.

Mr. DeLone: So there will be no doubt about it, that deposition was taken December 8. I first received it Monday of this week.

Mr. Richter: What difference does that make? That is not the point.

Mr. DeLone: I want your Honor to understand the facts. I think you are entitled to the fact.

Mr. Richter: It is part of the brief—this deposition is part of my brief, it accompanies my brief, and the briefs were sent to your Honor the same day that they were sent to Mr. DeLone. My secretary unfortunately didn't know about this affidavit because I had handled this myself, and when I talked to her on the phone I said, What about the affidavits? Did they go out, too? She said, No. I said, Please get them out immediately to both Mr. DeLone and your Honor, and they were sent to each of you the following day. I am sure you got yours in the mail the next day after the briefs.

The Court: That is just what I wanted.

Mr. Richter: I want to be sure your Honor gets that picture.

* * *

Opening by Mr. DeLone:

* * *

(74) Now I want to come to Lawler. And before I start on Lawler, sir, I think we should be clear about something. I was served on Monday of this week with something called a deposition, which pertains to a man named Lawler. There is nothing in the motion for new trial, properly filed in this case, that says anything about Mr. Lawler, but in a supplementary motion, filed more than ten days after, supplementary reasons filed more than ten days after, Mr. Richter inserted these words, "Misconduct concerning Lawler", whatever that might mean. That was filed, I

guess, a month and a half or two months after the motion. I have cited in my brief cases which will demonstrate I think to your Honor's satisfaction that plaintiff's counsel can not come in after the ten days has expired and try to state new reasons for overturning the verdict.

It is obvious that Mr. Richter, after he had filed his reasons, perceived that he really didn't have a very good basis for a new trial, so he set about to try to get one. And how did he do it? Sometime in December he caught up with a man named Lawler, and he takes what he calls his deposition, on December 8. He doesn't notify me, (75) although he is going to use this as a basis for a charge leveled at me, he doesn't notify me he is going to take a so-called deposition. He doesn't give me an opportunity to be present. He takes it ex parte in his own office, in the quiet of his own office, and then he comes, sits on it, doesn't ever let me see it—until when? February 27. And I have been on trial in Philadelphia this week against another member of his firm almost all week.

Now, I say, sir, that that deposition should be stricken from this case and should be given not one whit of consideration. It was not taken with an opportunity to counsel to cross-examine. It was taken too late. The reasons assigned about Lawler were filed too late, and I submit that I should not answer it, and I do not propose to answer it, sir, and I ask your Honor to strike it from the record and give it no consideration.

I will go on, however, and deal with it here. I do not, unless your Honor instructs me to, expect to file any answering affidavits under these circumstances. I do not think it is entitled to be dignified with that. If Mr. Richter would have given me a chance to be there when that deposition was taken, we would have something else to talk about. But he kept it all to himself very nicely so he could spring it at the last minute on me.

(78) Now, if we are to go beyond the record in this case, I think then your Honor is entitled to know also—and I don't condone this but it seems to me it has been done by Mr. Richter—one of my associates, Mr. Arthur E. Newbold, attended the depositions at Mr. Richter's office on June 19, 1953, and when he came back he dictated a memorandum, June 22, 1953, and this is what he said: "Lawler appeared in Richter's waiting room with the rest of us. I attempted to engage him in conversation, but he refused (79) to talk to me, telling me he was very much against the railroad. We had to wait ten or fifteen minutes before Mr. Richter was ready, and as I went into Richter's office the Claim Agent told me that Lawler had walked out saying he had been subpoenaed for 10 o'clock, and since his deposition was not taken at 10 o'clock, he was under no obligation to stay. His testimony therefore was not taken." Just as Mr. Richter has said. But they are the men who had been subpoenaed by Mr. Richter back in June of 1953.

* * *

(91) And if you want to go beyond the record, you should know that we have a medical report on Mr. Lawler dated February 27, 1953, where our doctor who examined him in connection with his personal injury claim thinks the man is an alcoholic and a psychoneurotic. And if you will look at the deposition that he gave Mr. Richter, the so called deposition, I think you can see the traces of that even in what was obviously a well-coached deposition, with counsel for the other side not there. I say that because if you look at page 12 of this so-called deposition, you will see this remark—this is Lawler talking to Mr. Richter in his office—"As far as him saying that they couldn't contact me, in court, it was a lot of baloney, because he had been in contact with me." What could that mean, sir, except that in advance of the deposition Mr. Richter, or one of his representatives, had talked to Lawler and had told Lawler that I had said in court that we couldn't contact Mr. Lawler.

* * *

REPLY BY MR. RICHTER:

* * *

(93) The Court: Mr. Richter, when that man went out of your office under subpoena, didn't you have some redress by going to the Court and having him brought in?

Mr. Richter: We could have gone to the Court to get contempt proceedings if we wanted to at that time. We concluded that we had the information that we needed, and we went out and looked for the fellow. We figured, Maybe something happened out there. We didn't know what happened. This memo he reads from Mr. Newbold was something completely unknown to us, because I was in my office, and my waiting room is perhaps fifty feet away. I didn't know what happened there. All I knew is when I called for Lawler, Lawler had disappeared. Maybe the man got sick or walked out. He said he went home. I didn't want to be unfair.

So we got looking for the man after getting on to this file to get it ready and we couldn't find him. Now his evidence here is after-discovered evidence, and we have (94) ninety days after we find out about these things under the rules, as I understand them, to file a supplementary motion if we get after-discovered evidence, and that is the reason the ten-day rule means nothing insofar as using this deposition is concerned, because as soon as we found out about it we filed our motion and filed it with the Court.

The Court: Now, look, you have not made any argument that this is on the basis of after-discovered evidence. You are saying it is misconduct of Counsel.

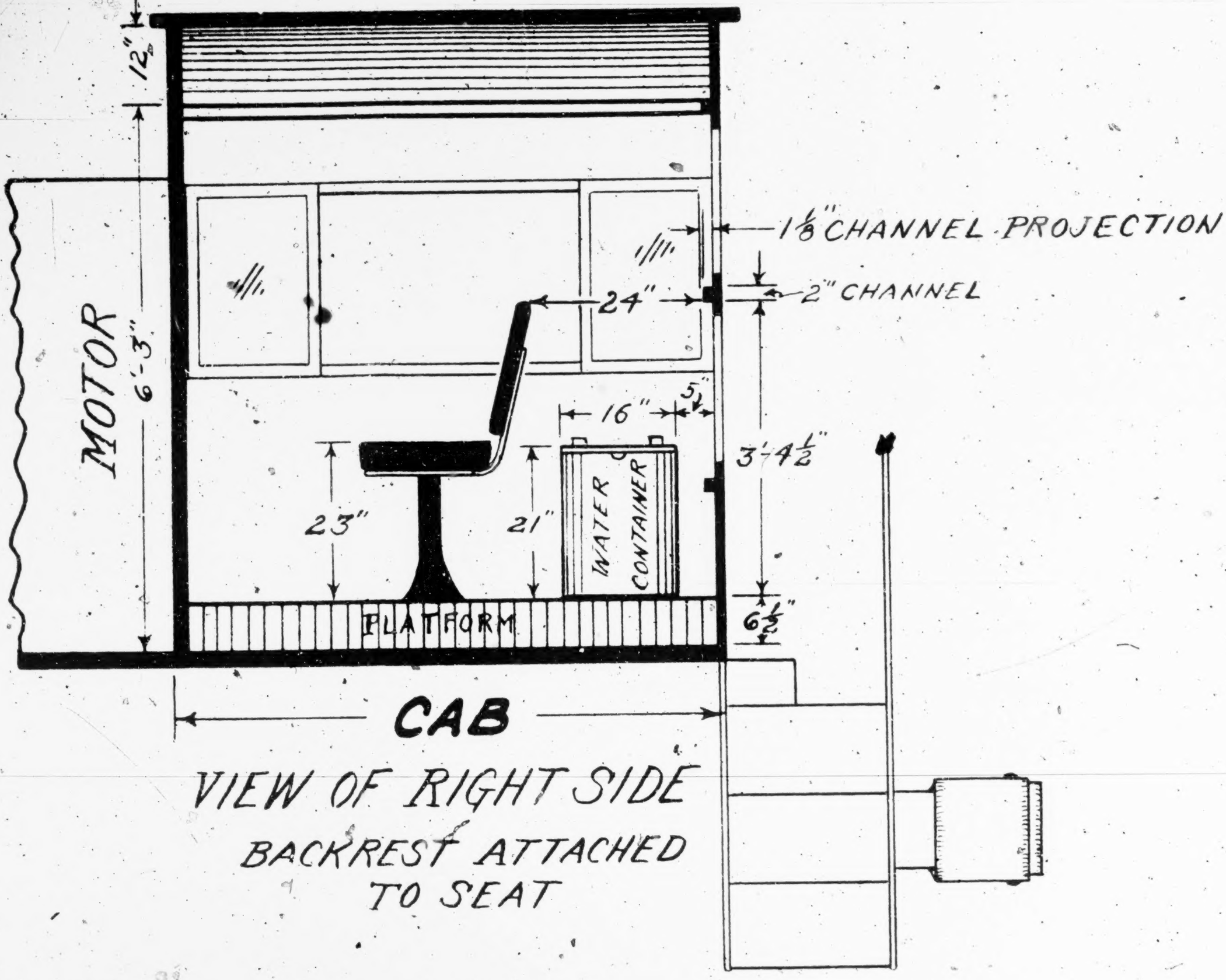
Mr. Richter: But it amounts to that. That is the point. It proves the point of misconduct of Counsel.

The Court: Well misconduct of Counsel means misconduct of Counsel to me. I may look at the cases and find out differently. But this is the first time that I have

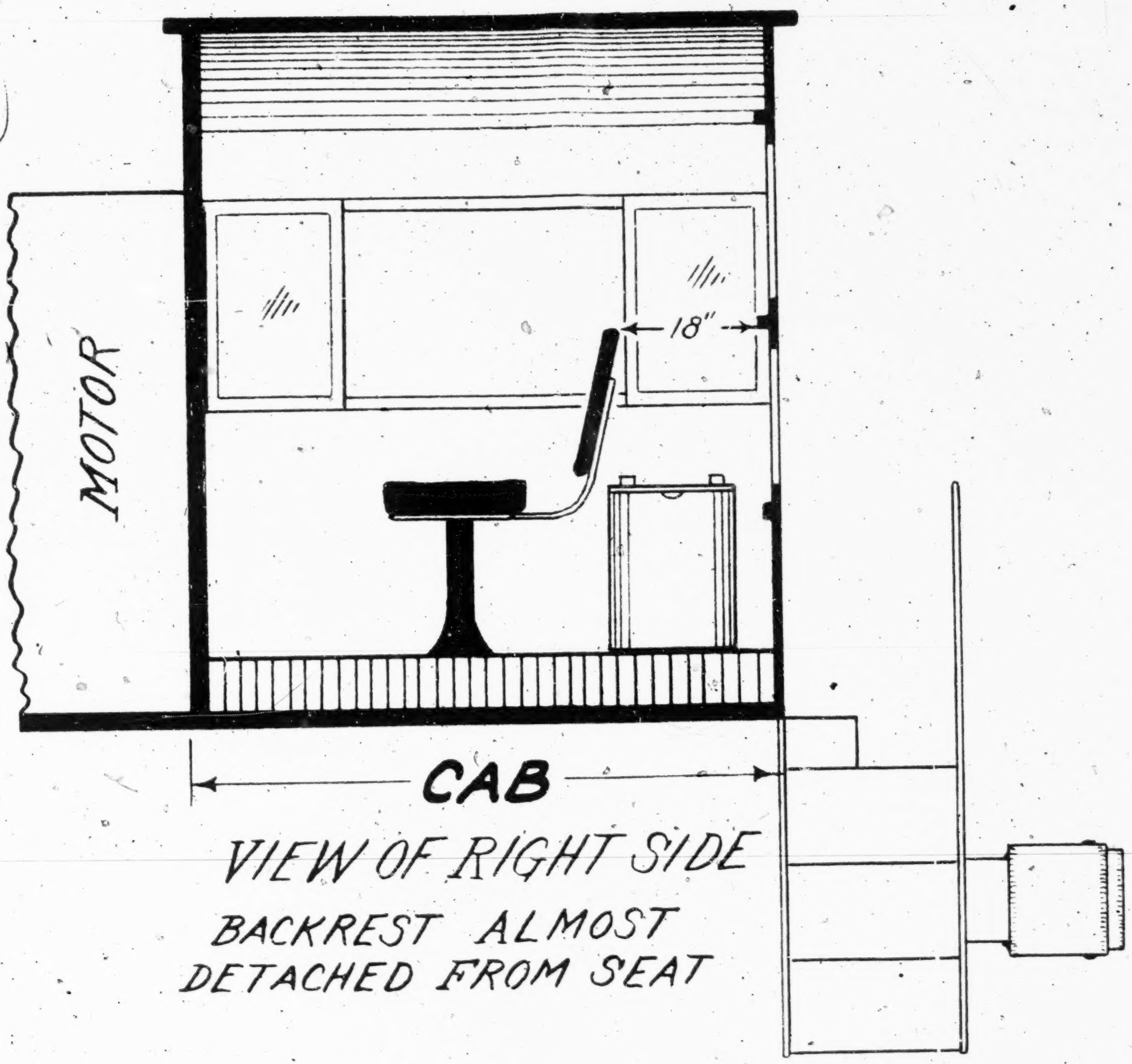
heard any suggestion that you are asking for a new trial on the basis of newly discovered evidence.

Mr. Richter: I am only pointing out to your Honor that at the trial of the case certain things were done by Counsel which he knew were untrue and that therefore the after-discovered evidence which we are using for the purpose of proving that it was untrue at that time necessitated, because of the date when we learned of it, the filing of a motion out of time, and I think that is exactly the purpose of that rule, which allows you to file such a motion beyond (95) the ten-day rule.

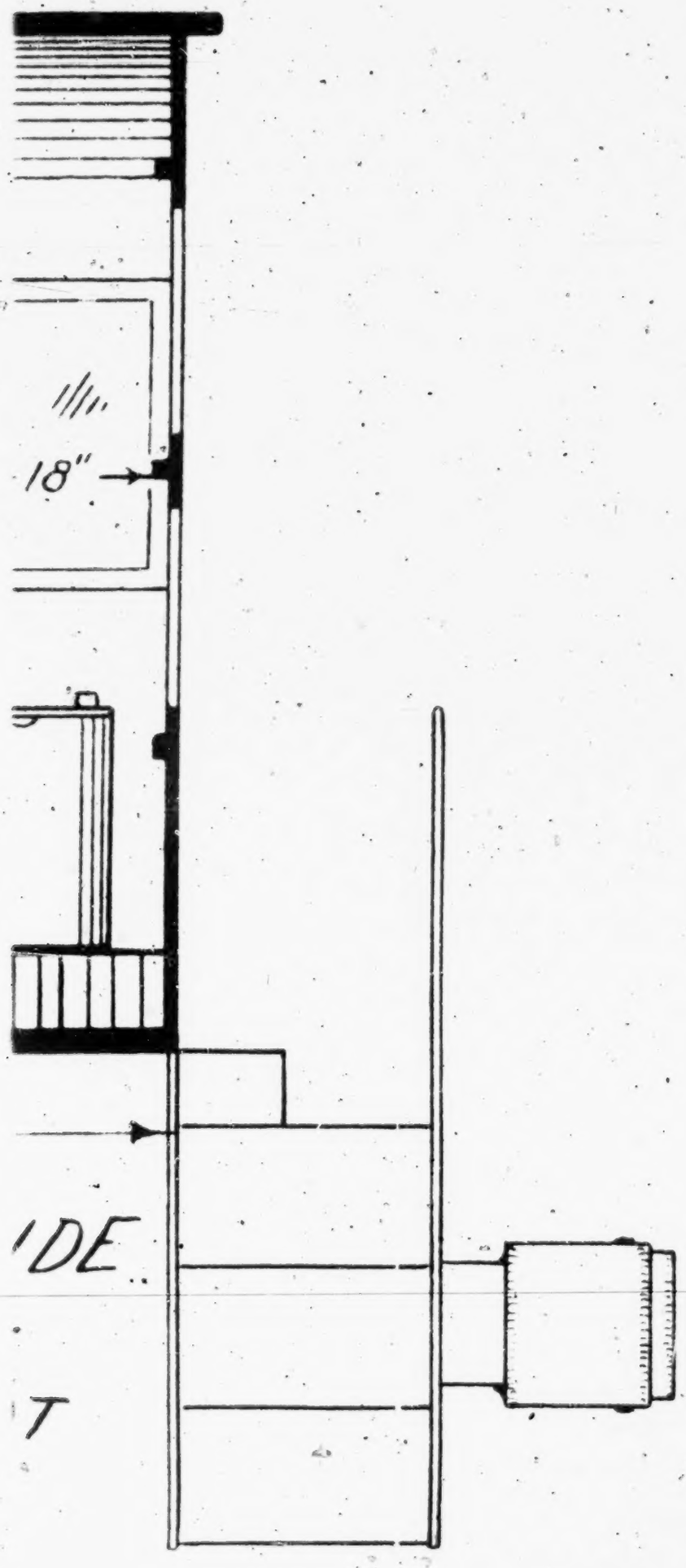
* * *

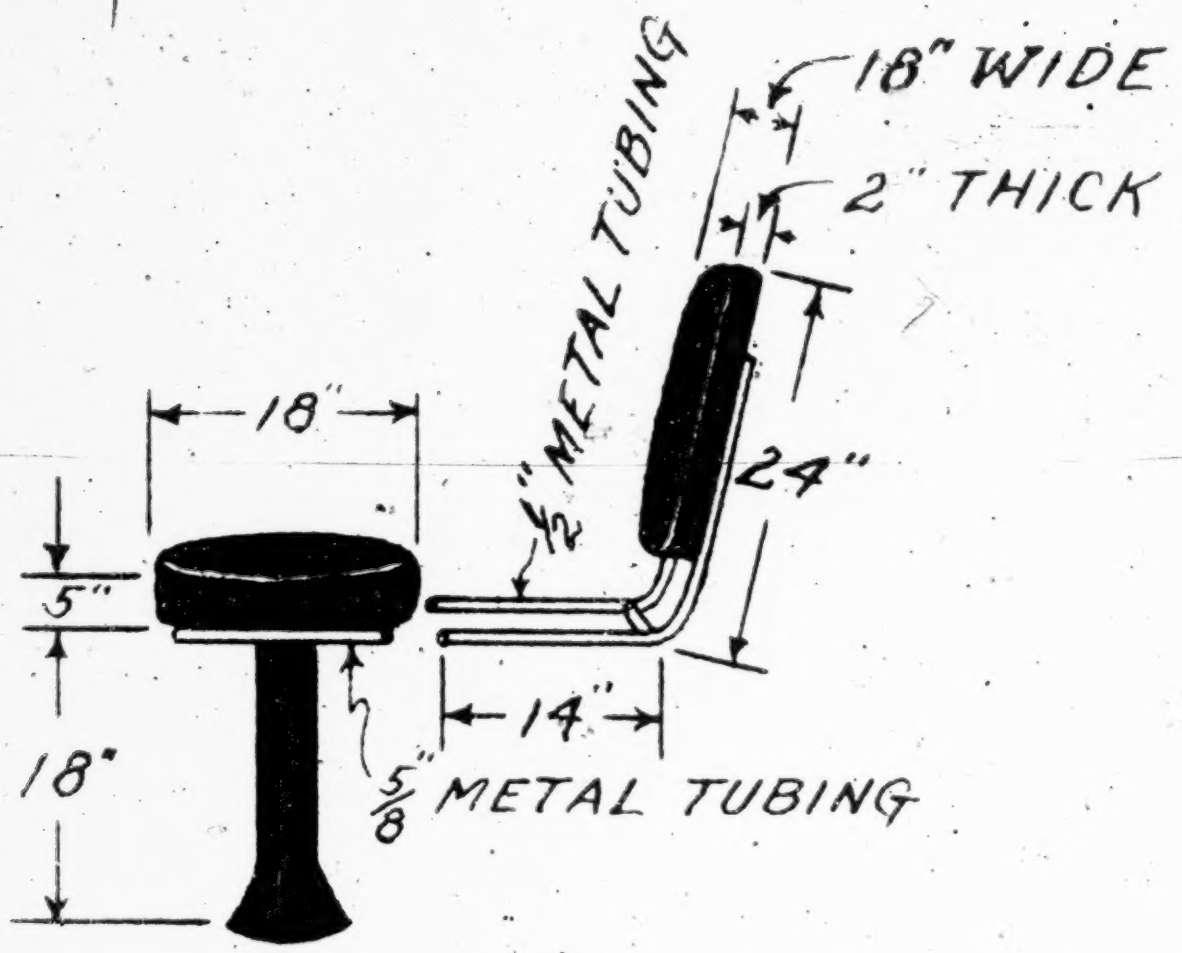


VIEW OF RIGHT SIDE
BACKREST ATTACHED
TO SEAT



VIEW OF RIGHT SIDE
BACKREST ALMOST
DETACHED FROM SEAT


18"
IDE
T



ENGINEER'S SEAT & BACKREST

SHOWING LEATHER COVERED BACKREST ABOUT TO BE ATTACHED TO LEATHER COVERED SEAT BY INSERTING ½" METAL TUBES OF BACKREST INTO 5/8" METAL TUBES FASTENED TO UNDERSIDE OF SEAT.

PLAN NO. 3290-B

P.R.R.

EASTERN REGION PHILA. DIVISION

TRENTON BRANCH

EARNEST - PA.

CAB OF DIESEL ENGINE NO. 5598

MADE MAY, 1950, BS-7A

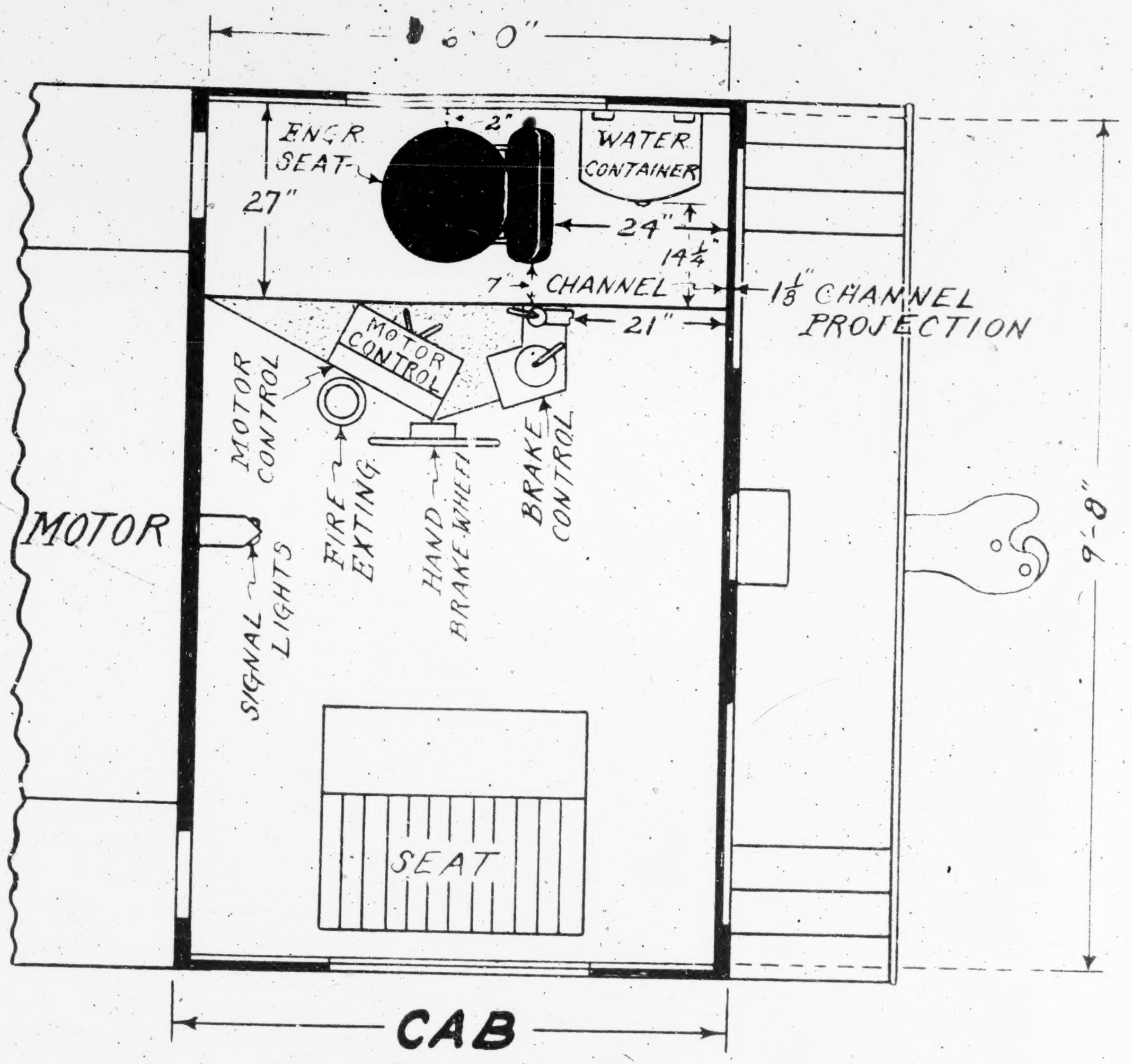
— IN REGARDS TO —

R.N. HEISELMOYER VS. THE P.R.R. CO.

INJURY SEPT. 19, 1952.

SCALE: $\frac{1}{2}$" = 1'-0" DEC. 1, 1952

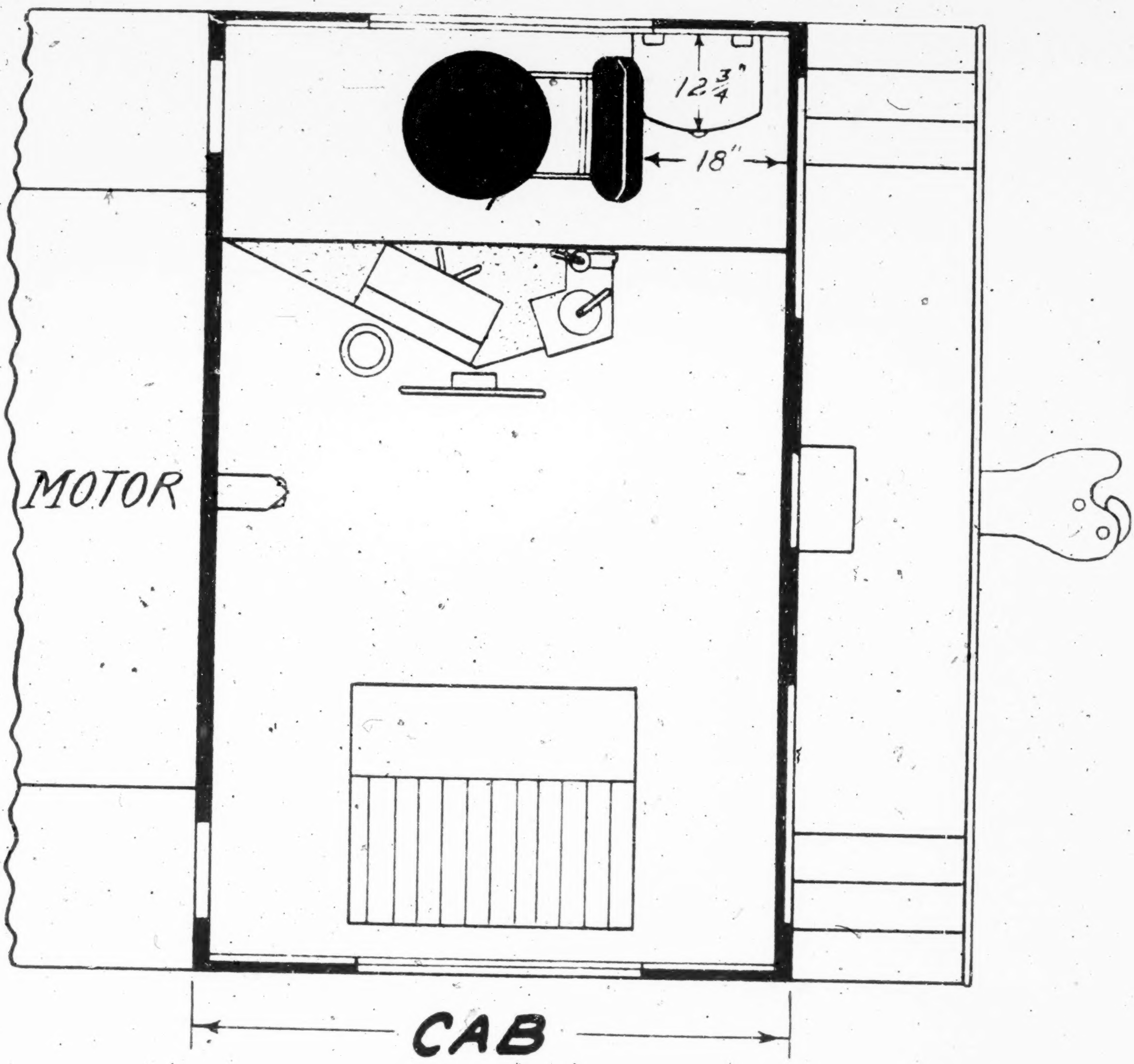
OFFICE OF DIV. ENGR., HARRISBURG, PA.



CAB

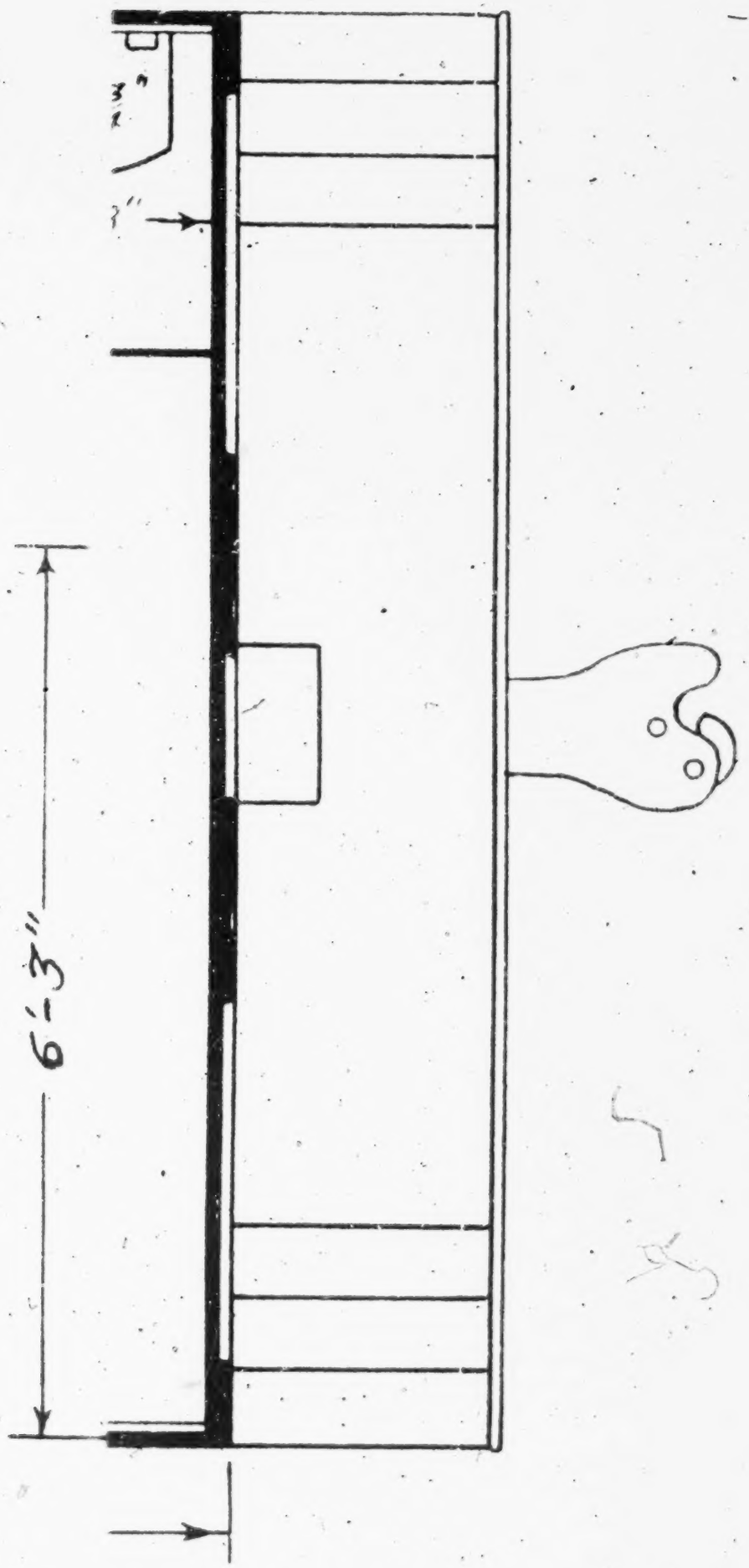
PLAN

BACKREST ATTACHED TO SEAT



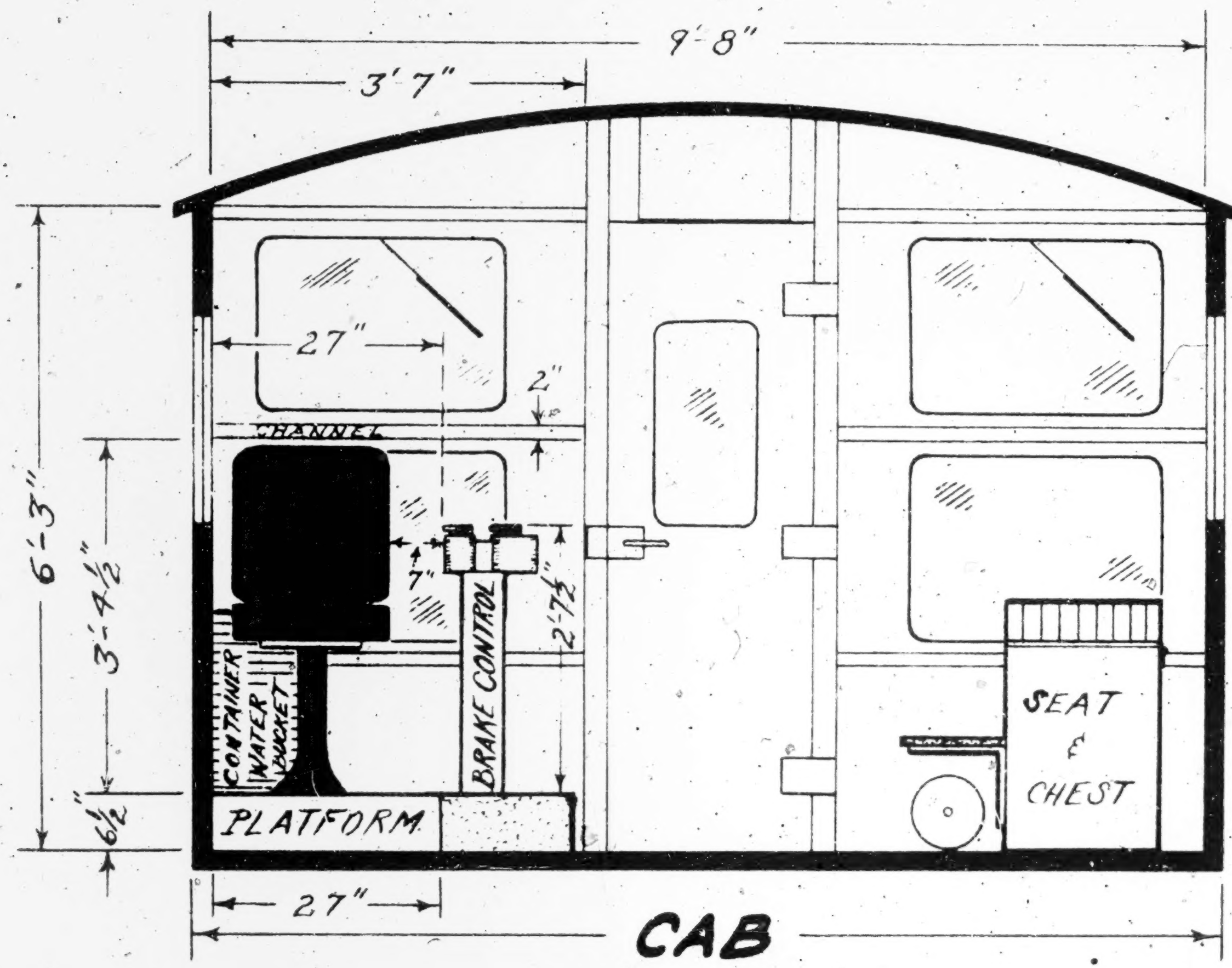
PLAN

BACKREST ALMOST DETACHED
FROM SEAT

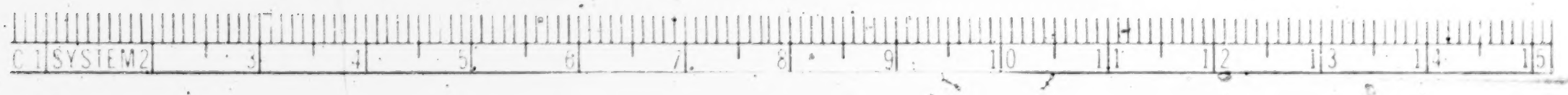


CHED

E



VIEW OF BACK END OF CAB



Cameraman's Ruler

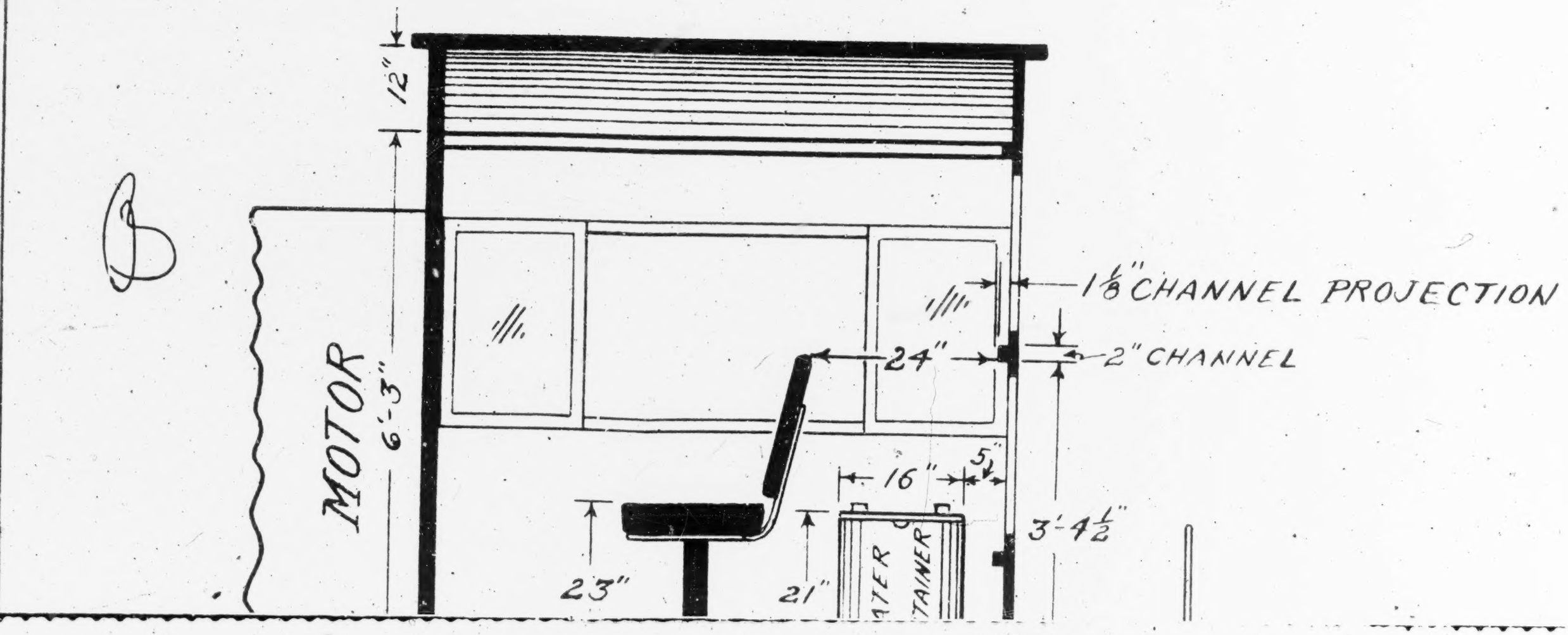
Cameraman's Ruler

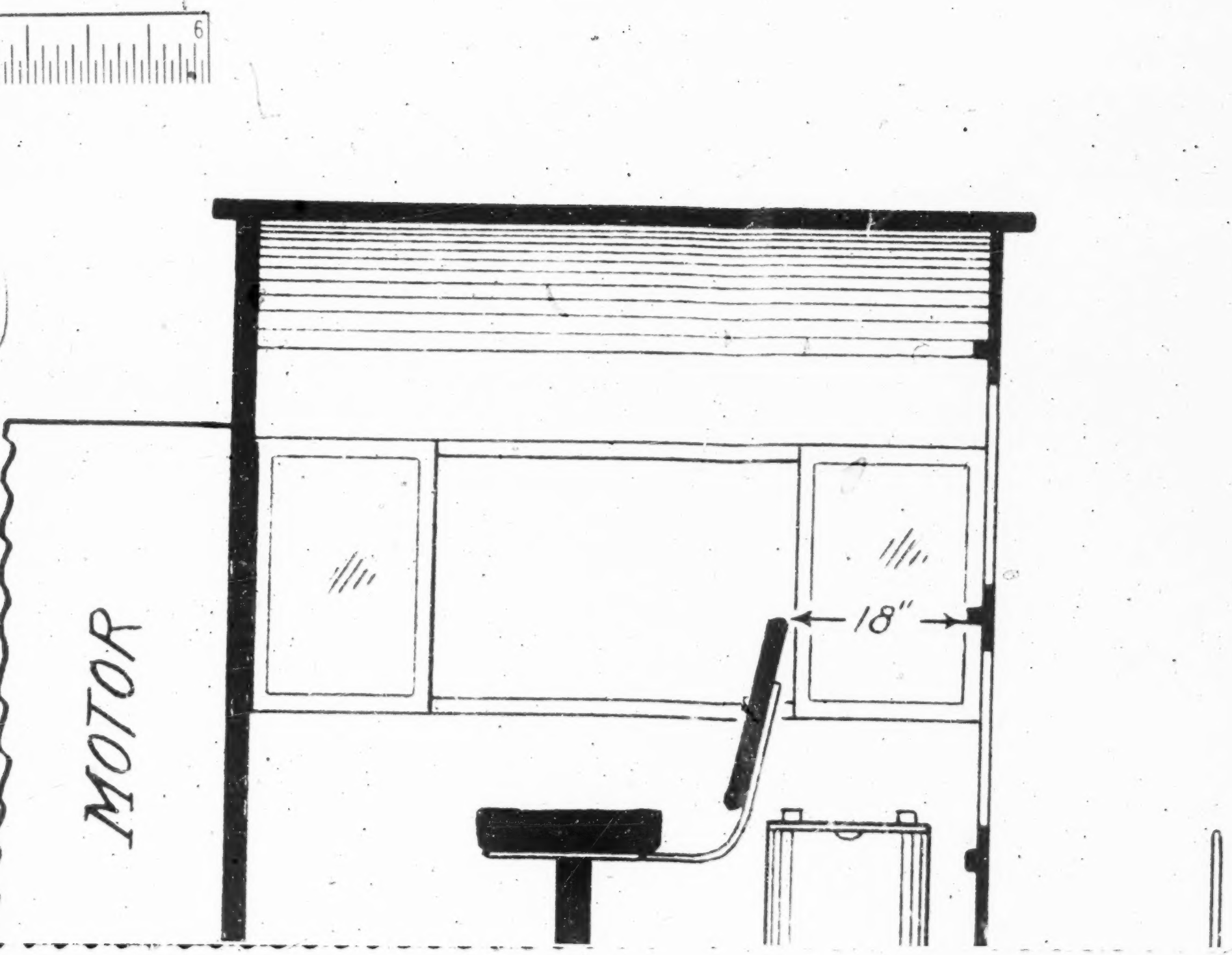
MEASUREMENTS

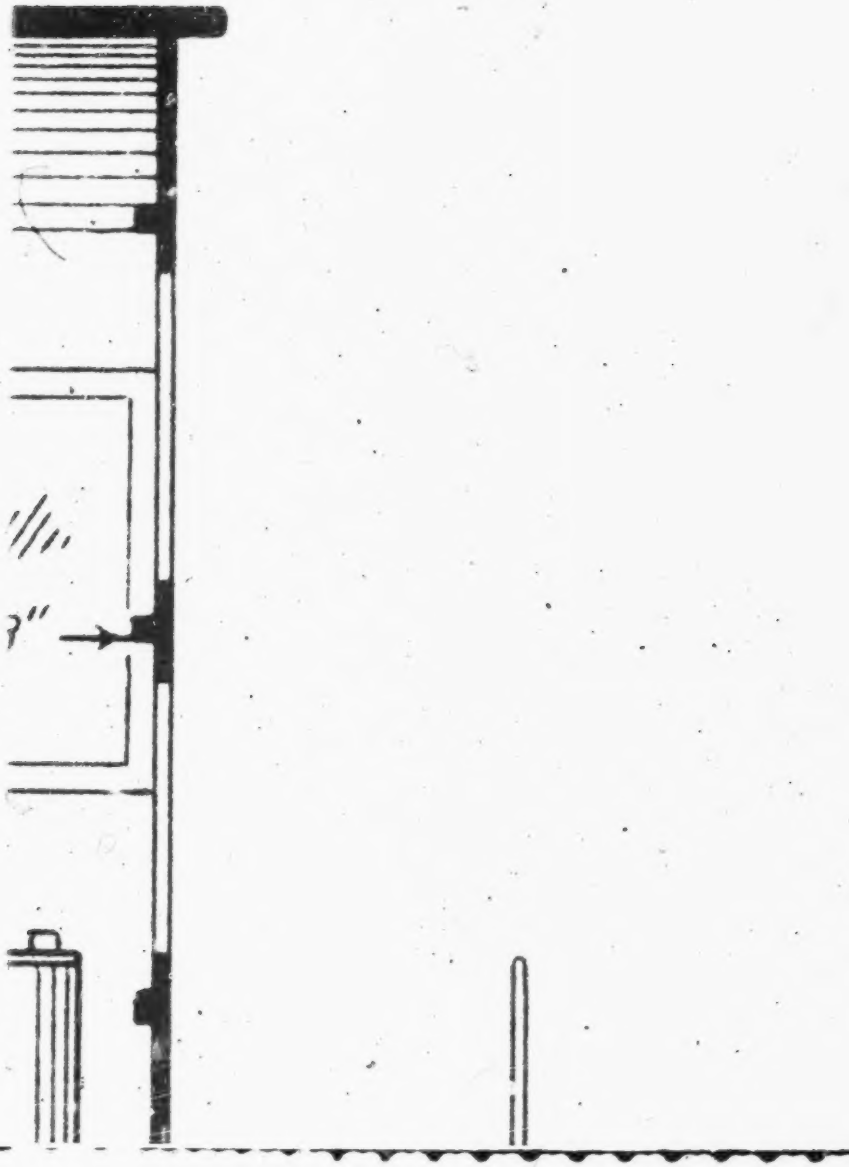
BACKREST	– Height above Platform	3'-4½"
"	– Length	2'-0"
"	– Width	1'-6"
"	– Cushion Thickness	0'-2"
"	–(Attached to Seat) To Rear Wall Channel	2'-0"
"	–(Almost detached from Seat) To Rear Wall Channel	1'-6"
"	– Metal Tubing - Inside Diameter	0-0½"
SEAT	– Height above Platform	1'-11"
"	– Diameter of Cushion	1'-6"
"	– Thickness of Cushion	0'-5"
"	– Clearance-Seat Cushion to Right Side of Cab	0'-2"
"	– Metal Tubing Inside Diameter	0'-0⅝"
CHANNEL	– Length - Back End of Cab	3'-7"
"	– Height above Platform	3'-4½"
"	– Width - Top to Bottom	0'-2"
"	– Actual Projection from Wall	0'-1⅛"
WATER CONTAINER	– Height	1'-9"
" "	– Width	1'-4"
" "	– Depth - Front to Back	1'-0¾"
" "	– Front-to Edge of Platform	1'-2¼"
BRAKE CONTROL	– Height above Platform	2'-7½"
" "	– To Right Side of Cab	2'-3"
" "	– To Backrest (Engr. Facing Foreward)	0'-7

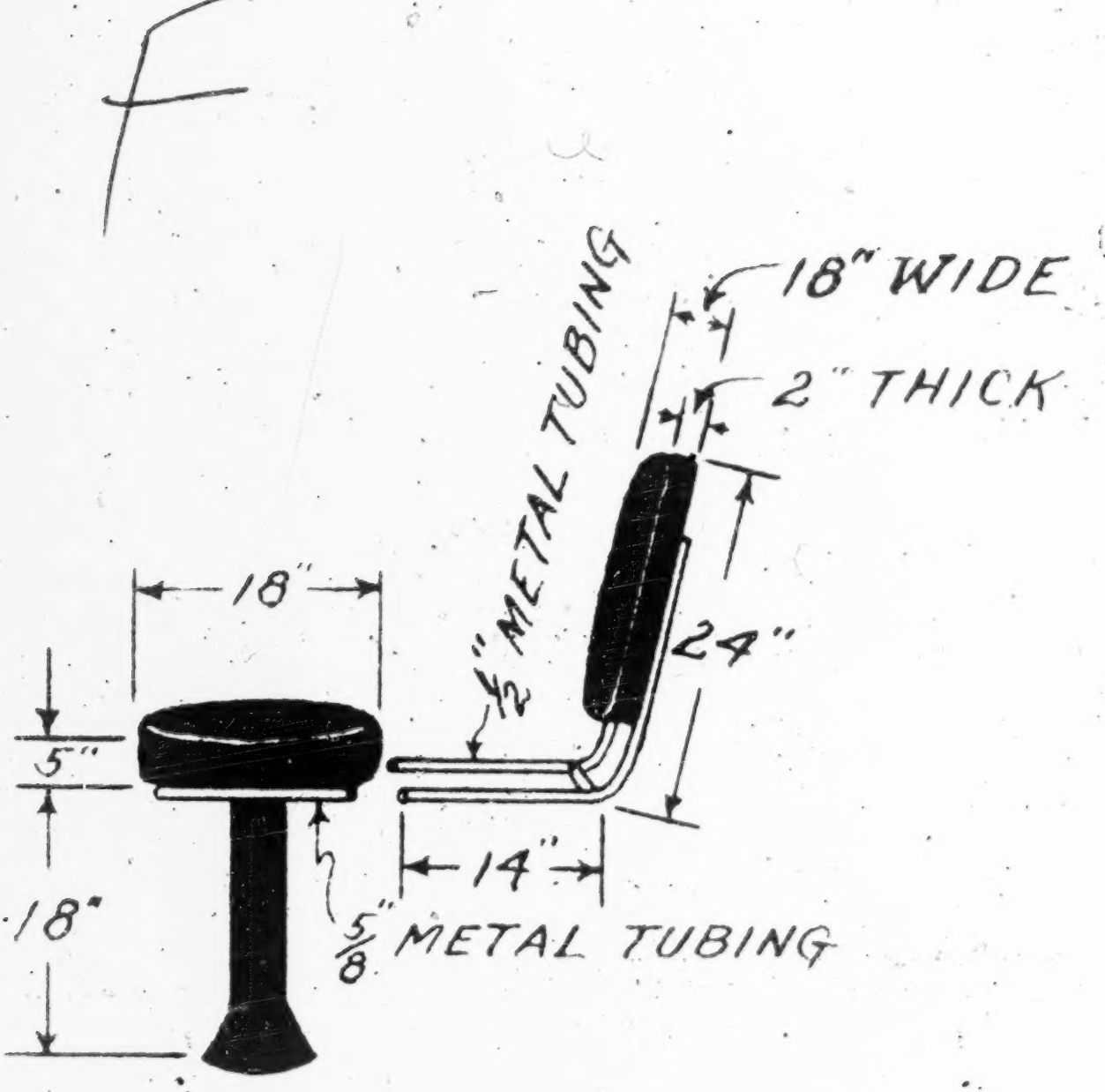
Cameraman's Ruler

Cameraman's Ruler




6
MOTOR
18"




18" WIDE
2" THICK
½" METAL TUBING
18"
24"
5"
18"
14"
⅝" METAL TUBING

PLAN NO. 3290-B

P.R.R.

EASTERN REGION PHILA. DIVISION

TRENTON BRANCH

EARNEST - PA.

CAB OF DIESEL ENGINE NO. 5598

MADE MAY, 1950, BS-7A